APPENDIX A — OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS DATED MAY 21, 2003

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 72,795

DARLIE LYNN ROUTIER,

Appellant,

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DALLAS COUNTY
ON CHANGE OF VENUE TO KERR COUNTY

PRICE, J., ***delivered the unanimous opinion of the Court.***

The appellant was convicted of the capital murder of a child under six years of age. Tex. Penal Code § 19.03(a)(8). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071, sections 2(b) and 2(e), the trial judge sentenced appellant to death. Tex.Code Crim. Proc. art. 37.071, § 2(g). Direct appeal to this Court is automatic. Tex.Code Crim. Proc. art. 37.071, § 2(h). The appellant raises fourteen points of error. We shall affirm.

The evidence that supports the verdict shows that the appellant stabbed and killed her two sons, Damon and

Devon,[1] while her husband and infant son were asleep upstairs in the house. The appellant does not challenge the legal or factual sufficiency of the evidence to support her conviction, and therefore, it is not necessary to set out the evidence in detail.

I. Claims Regarding the Record

In her brief, the appellant makes several claims regarding the preparation and certification of the reporter's record in addition to claims regarding her trial. We will address claims dealing with the accuracy of the record before dealing with the appellant's claims regarding her trial. Specifically, the appellant complains that she is entitled to a new trial because of problems with the reporter's record. She argues that, at a minimum, she is entitled to a hearing before the record can be used to decide her appeal. A review of the facts pertaining to these points of error is necessary.

The appellant's trial took place in January 1997. The certified court reporter, Sandra Halsey, took stenographic notes during the trial. Halsey simultaneously typed notes of the proceedings onto paper strips ("notes") and onto computer edit disks ("disks") that automatically translated the stenographic symbols into English. In April 1998, under an order of contempt issued by this Court the month before,[2] Halsey prepared, certified, and filed the original reporter's record in the case ("Halsey record").

---

1. In this case, the State charged the appellant with the murder of Damon, a child under the age of six.

2. Halsey was late in preparing the record.

Appendix A

In a motion to correct and clarify Halsey's record, filed October 13, 1998, the appellant raised the first dispute about the accuracy of the record. An excerpt of the record that had been read to the jury did not match the corresponding portion of the Halsey record. Also, counsel noted discrepancies about who was present during the trial and when. The next day this Court granted the appellant's motion and ordered Halsey to prepare, certify, and file a supplemental reporter's record containing any omitted items. We also ordered the trial court[3] to resolve any dispute raised in the appellant's motion and to ensure that the reporter's record conformed to what occurred at trial.

The trial court conducted a hearing and decided that the entire record had to be reviewed to comply with this Court's October 14, 1998 order. In a hearing held October 30, 1998, pursuant to our order, Halsey testified that she made audiotape recordings ("tapes") in addition to the notes and disks during the trial. Halsey claimed that the audiotape recorder worked during only the voir dire portion of the trial. The trial court ordered Halsey to produce her notes, disks, and tapes from the trial. The trial court also ordered her to conduct a review of the record and make note of any problems she found or corrections she made.

At a hearing held on November 4, 1998, the trial court appointed three certified court reporters, Tommy Mullins, Judy Miller, and Jerry Calloway ("the experts"), to perform a review and to compare the notes and disks to Halsey's

3. The trial judge who presided over the hearings regarding the record, Judge Robert Francis, is not the judge who presided over the trial on the merits. Judge Mark Tolle retired after the appellant's trial.

record to determine whether Halsey's record could be certified.

Although Halsey had told the trial court and the experts that she possessed no tapes from the guilt and punishment phases of the trial, on November 12, 1998, she told prosecutor Lindsey Roberts and appellant's counsel Stephen Cooper that tapes from those phases of the trial did exist. According to a stipulation read into the record, she went with Roberts to retrieve the tapes from a storage facility in Plano. Halsey told Roberts that the tapes she produced were from the Routier trial. These tapes were produced during the hearing in the trial court on November 13, 1998. The appellant expressed concern about the authenticity of the tapes. The trial court received the tapes with the understanding that the question of their authenticity would be subject to further review.

Also during the hearing on November 13, the experts testified that they performed their review by comparing a total of twelve random pages from four of the ten volumes of Halsey's record of the trial with the corresponding notes and disks. On each of the four pages, the experts found several differences between what was in the notes and what was on the pages from the record. They concluded that the only way to account for so many differences between the notes and Halsey's record is that someone listened to tapes from the trial and made changes based on the tapes.[4]

---

4. Miller testified that she heard Halsey's reason that the tape recorder did not work during the appellant's trial: the recorder required a battery in the external microphone. Miller said that she

(Cont'd)

Appendix A

Halsey's daughter and transcription scopist,[5] Suzy Crowley, testified that Halsey gave her tapes of the guilt and punishment phases of trial. Crowley stated that she used the tapes to make permanent changes to the English translation of the original proceedings on the disks. She testified that the tapes presented by Roberts looked similar to the ones she had used and that they had labels on them that identified them as being from the Routier trial. Scopist Michelle Reynolds reviewed and edited the voir dire portion of the trial.

Halsey did not testify at the hearing on November 13, 1998. The trial court appointed counsel for her. At the conclusion of the hearing, the trial court rescinded its prior order of October 30, 1998, to have Halsey review her record and ordered her to cease any proceedings regarding the record. The trial court said it would appoint a certified reporter, agreeable to both the State and the appellant, to review Halsey's record and determine whether it could be made to conform to what occurred at trial.

On November 19, 1998, the trial court appointed Susan Simmons, a certified court reporter for the United States

---

(Cont'd)

had used the same type of equipment before and that the battery in the microphone improves the quality of the recording, but the recorder has an internal microphone that will pick up sound even if the external microphone does not have batteries.

5. A transcription scopist assists a court reporter in preparing the trial record. Testimony taken during the proceedings on the record indicated that the use of a scopist is a normal and necessary part of the process of producing a trial record.

District Court in Tyler, to perform a review of the guilt and punishment phases of the record, as well as the pretrial hearings.[6] The parties and the experts all agreed that Simmons was qualified and competent to perform the review. During the hearing, the appellant's counsel explained that he was not sure if it was legally permissible or even possible to certify the record. He reserved the right to offer evidence on this point at a later time. Halsey appeared with her attorney that day. To comply with a subpoena duces tecum requesting all materials regarding the appellant's trial, her attorney turned over the notes and disks for the entire trial. Halsey refused to testify, however, and asserted her Fifth Amendment privilege.

On December 9, 1998, Halsey's attorney produced twelve more tapes, which he claimed were additional tapes from the trial. Halsey was then relieved of her duties as the official court reporter in this case. The trial court ordered Halsey to continue to look for more tapes.

On April 1, 1999, the trial court conducted a hearing during which Simmons testified that she had revised the Halsey record of the guilt and punishment phases of the appellant's trial. Simmons submitted the revised record ("Simmons record") and her red-lined copy of the Halsey record that reflected all of the changes that she had made. Counsel for the appellant and the State were not permitted to question Simmons directly.[7] Before the hearing, the trial

---

6. The materials for the guilt and punishment phases were given to Simmons on November 20, 1998. Francine Eikner was appointed to assist Simmons as a scopist on December 10, 1998.

7. The appellant's counsel had filed a motion to ask questions directly of Simmons, which was denied.

court provided to the parties the questions it would ask Simmons. The parties were permitted to submit written questions to the trial court, and the trial court read the questions that it concluded were relevant and not repetitive. The trial court instructed the parties not to object to questions during the testimony; they were directed to submit those objections before the next hearing. The trial court stated that it would also afford the parties an opportunity to submit a bill of exceptions. The parties were given a break during the testimony to submit further questions based on the testimony that had already been heard.

Simmons testified about the standard procedures for preparing a record of proceedings. First, during the proceedings, the certified court reporter writes on a machine notes of what occurs. The notes include a list of the people who are present, the date of the proceedings, the name of the proceedings, the testimony taken, and the list of exhibits. The machine simultaneously prints the symbols onto the notes and records the symbols onto a disk or hard drive. The symbols on the notes cannot be read or deciphered by someone without some training as a court reporter or scopist. The notes are labeled with the date and subject matter. It is common for the court reporter to use an audiotape recorder as a backup. Generally, the recorder is connected to the microphones on the witness stand, the attorneys' tables, and the judge's bench.

Simmons testified that after the proceedings are over, the court reporter takes the disk to a computer and uses software, to which the reporter's personal dictionary has been added. The dictionary in the software produces an English

translation of the symbols. The computer produces a split screen on the monitor, which shows the symbols on one side and the English translation on the other side. The English translation will show some "untranslates," which are symbols that the software does not recognize. After the reporter enters the correct word, the symbol for the word and its translation are added to the reporter's personal dictionary.

According to Simmons's testimony, if the reporter uses a scopist, and most do, the translation is put on a duplicate disk, which is given to a scopist along with the backup tapes. The scopist performs the first edit. Ordinarily, the scopist loads the disk and listens to the tapes going line-by-line checking for corrections and unrecognized words. Then this edited version is saved on another disk to leave intact the original English translation that was produced at trial,[8] and all the materials are returned to the reporter.

Simmons indicated that the reporter, after receiving the materials from the scopist, proofreads either the hard copy of the new translation or the on-screen copy while listening to the tapes. Then the reporter proofreads the record one more time, checks for spelling errors, and prints and certifies the record.

Simmons testified about her work in the appellant's case. She explained that she followed the instructions in the trial court's order. The trial court had not ordered Simmons to certify the record; she was ordered to review the record from

---

8. Crowley's testimony indicated that, as Halsey's scopist, she edited on the original disks and recorded over the files created during the trial.

the guilt and punishment phases of the trial and to certify it if possible. She possessed the Halsey record, the disks, tapes, notes, and some handwritten notations by Halsey. She followed the procedure that is ordinarily employed when a court reporter is unable to produce the record because of either death or disability.

Simmons testified that she first went through the notes and the tapes to be sure that she had them for each volume of the Halsey record she had been assigned. She said that it appeared that she had been provided with a complete set of materials for the guilt and punishment phases of the trial. She said it was possible to create a certifiable record based on the materials provided. The notes prepared on the machine appeared to be complete with no gaps in the proceedings and within the range of competent reporting. The disks were in useable form and appeared to be complete. The tapes were audible and seemed to be complete with no discernible gaps or alterations.

Simmons testified that she started the review process by listening to the tapes while going through the Halsey record line-by-line. She marked the corrections onto her copy of the Halsey record. When she had questions, she flipped to the appropriate portion of the notes. She did not perform a systematic review of the notes. She was able to identify witnesses when they stated their names at the beginning of their testimony. If a voice was not identified in this manner, she used the notes, which contained symbols identifying the speakers.

Simmons then took the marked version of the Halsey record and the disks to her scopist. The scopist copied each disk onto her hard drive. Then she made the changes marked in pen and saved the files on new disks so that there would be no alteration of the disks provided by Halsey. The scopist printed a hard copy of the changes. Simmons proofread the hard-copy by doing a page-by-page comparison of the changes.

This procedure was followed until all of the volumes for the guilt and punishment phases were completed. Then Simmons prepared a master index, exhibit index, and witness index, which was compared to the scopist's list. Three hard copies of the final edited version ("Simmons record") were produced along with disks with a universal translation.[9]

Simmons testified that she believed that Halsey used more than one scopist to create the record. It is standard practice for the reporter who actually heard the trial to review the changes a scopist makes using the tapes. It is normal for the final record to be different in some respects from the unedited notes. The purpose of editing the notes is to make them reflect, as nearly as possible, what happened at trial. Simmons said that the Halsey record was inaccurate and poorly prepared. She opined that the deficiencies in the Halsey record were based on a lack of proper editing. Simmons did not attend any of the proceedings in Kerrville and had no personal knowledge of what happened at trial. But Simmons testified that she believed, based on the

---

9. This is known as an ASCII format, which can be read by any word processing software.

materials provided and her expertise, she was able to render a complete and accurate record that conforms to what occurred at trial. She said that, if the materials did not contain a complete and accurate account of the proceedings, then the Simmons record could suffer from the same flaws. But she believed that the materials provided accurate information for preparing the record. Simmons has reconstructed trial records in other cases, and she was able to certify records in those cases. In her expert opinion, the record as prepared by her had been made to conform to what happened at trial to ninety-five percent accuracy.

On April 26, 1999, the Court of Criminal Appeals ordered the trial court to ensure that the entire record, including voir dire and pretrial proceedings, conformed to what happened at trial. We ordered the trial court to independently review other parts of the record in the same manner as it had the guilt and punishment phases. On May 4, 1999, the trial court appointed Simmons and her scopist to prepare the remaining portions of the record.

On October 14, 1999, a hearing was held to receive the remaining portions of the record that Simmons had completed. She testified that the tapes were audible and seemed to have no gaps or alterations, the disks for the volumes—other than Volume 16—were useable, and the notes—although there were mistakes—could be used to the extent she needed them. She testified that, once again, she was able to certify that the record conformed to what occurred at trial. She testified that she used the same procedures used to complete the guilt and punishment phases of the record, with one exception. For Volume 16, there was

no disk. Therefore, Simmons proofread the hard copy of the Halsey record with the tapes and had her scopist retype the entire volume.

Later, the parties and the trial court became aware that Volumes 10 and 11 had not been sent to Simmons for preparation. The materials were then sent to Simmons, and she was ordered to review the materials in the same manner as she had reviewed the other portions of the trial. The trial court ordered Simmons to revise and certify a record if possible.[10]

At a hearing on January 28, 2000, Simmons testified that she followed the same procedure for preparing and certifying the record, except for the first 54 pages of Volume 10.[11] These pages contained the proceedings for October 21, 1996. For those 54 pages, Simmons had the Halsey record, the notes, and the disk, but no tape. Going line-by-line, she compared the Halsey record with the notes taken on the day the proceedings occurred. She noted that there did not appear to be any gaps in the notes and that they were in good and useable form. Simmons refused to certify these pages,

---

10. The appellant objected on the basis that the tapes were not authenticated. She did not agree that the trial court's action regarding the tapes was legally appropriate. The trial court overruled the appellant's objection, but said that it might revisit the issue at another time.

11. Halsey's record had been 53 pages. Simmons transcribed the reading of the indictment, which was included only by reference in Halsey's record. Simmons also included some colloquy found in the notes before and after the reading of the indictment.

however. She explained that, based on the portions of the record she had prepared already and the state of the Halsey record, she was not comfortable certifying the first 54 pages without a tape to compare to the Halsey record. She said that her record for the first 54 pages of Volume 10 is an accurate transcription of Halsey's notes. Her decision not to certify was based on the following facts: she was not present at trial; she had no tape to use as a backup; and her review of the rest of the record indicated that she needed a tape to correct the record because it had been edited so poorly.

Simmons testified that on the tape for the afternoon session of court on October 21, 1996, in a conversation between Halsey and someone from the Sheriff's Department, Halsey mentioned that she needed some batteries.[12] Simmons believed that this might explain the absence of a tape for the morning session. Simmons believed, however, that a tape existed for the morning session because there were words that appeared in the Halsey record that did not appear in the notes. At the conclusion of the hearing, the trial court announced that it would give the parties 120 days in which to review the entire record and make objections.

On February 9, 2000, the trial court issued an order stating that Volumes 10 and 11 of the Simmons record should replace the same volumes of the Halsey record because the Halsey record did not conform to what occurred at trial. The Court, by agreement of the parties, gave the parties until March 6, 2000, to file objections to the Simmons record.

---

12. The tape for the afternoon proceedings was transcribed in the second part of Volume 10. This conversation does not appear in the record because the court was not in session.

Appendix A

On March 2, 2000, the appellant filed written objections to the Simmons record and a written request for a hearing to resolve factual disputes about the record. The State's response to the appellant's written objections was filed April 28, 2000. On September 1, 2000, the trial court scheduled a hearing on the appellant's objections to the record to take place on September 8, 2000. The appellant's attorney subpoenaed several witnesses, including Judy Miller, Mary Docklar, Jerry Calloway, Doug Mulder, Jeff Crilley, Lindsey Roberts, Toby Shook, and Greg Davis.

On September 7, 2000, the trial court issued findings on the record and an order cancelling the hearing scheduled for the next day. The findings say that the trial court reviewed the orders issued by the Court of Criminal Appeals, the record from all hearings held to comply with the orders issued by the Court of Criminal Appeals, the findings and orders of the trial court, the appellant's objections to the record, and the State's response. The trial court found that the appellant's objections were clear and concise and would apprise the Court of Criminal Appeals of the appellant's concerns about the record. It found that the appellant's motions to suppress evidence in the proceedings on the record were beyond the scope of the orders of the Court of Criminal Appeals. It also found that an evidentiary hearing as requested by the appellant was not necessary to comply with the orders of the Court of Criminal Appeals, the orders had been complied with, and that it would not hold any other hearings unless the Court of Criminal Appeals so ordered.

In response to the trial court's order cancelling the hearing, the appellant filed her Formal Bill of Exception

No. 1 and a Motion for a Hearing to Make an Offer of Proof on September 25, 2000.

The trial court responded with a finding that it no longer had jurisdiction of the case. The court forwarded the appellant's pleadings to the Court of Criminal Appeals without taking action.

A. Third Point of Error: The Entire Record is Inaccurate and Unreliable

In her third point of error,[13] the appellant claims that she is entitled to a new trial because the reporter's record does not conform to the requirements of Texas Rule of Appellate Procedure 34.6(a)(1)[14] and because the defect cannot be corrected. Specifically she states that Rule 34.6(a)(1) requires that the reporter's record be a certified verbatim transcription of the stenographic notes of the court reporter who attended the trial. Because the Simmons record is a transcription of unauthenticated tapes prepared by a court reporter who did not attend the trial, the appellant argues, the record does not comply with the Rule. Also, the appellant argues, Halsey's

13. In this point of error, the appellant addresses the record generally. As noted above, there are additional issues with the first 54 pages of Volume 10 of the record. The appellant's arguments regarding those pages will be addressed separately.

14. Rule of Appellate Procedure 34.6(a)(1) states that "[i]f the proceedings were stenographically recorded, the reporter's record consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits that the parties to the appeal designate."

notes cannot be transcribed accurately because the trial court found that the notes do not conform to what occurred at trial.[15] She also claims that settling disputes about the record with extrinsic evidence would be impossible because the trial judge who presided over the trial is retired[16] and the court reporter who created the notes has lost her certification. In essence, the appellant claims the Simmons record is a new record that consists of a transcription of the tapes. Further, she argues that the transcription of the tapes was not done in accordance with Rule 34.6(a)(2),[17] and to permit the Simmons record to be used would blur the distinction between the two methods of producing the reporter's record.

We disagree with the appellant's characterization of the Simmons record. The revised record is not a new record created from the tapes. The Simmons record is a corrected transcription of the notes taken at trial by Halsey. Simmons testified that the defects with the Halsey record were a result of poor editing and that Halsey's notes were within the range

---

15. This is incorrect. The trial court found that the Halsey record did not conform to what happened at trial. No specific findings were made about the notes, but Simmons testified that they appeared to be complete, useable, and within the range of competent reporting.

16. After retiring, Judge Mark Tolle began sitting as a visiting judge.

17. "If the proceedings were electronically recorded, the reporter's record consists of certified copies of all tapes or other audio- storage devices on which the proceedings were recorded, any of the exhibits that the parties to the appeal designate, and certified copies of the logs prepared by the court recorder under Rule 13.2." Tex. R. App. P. 34.6(a)(2).

of competent court reporting. Simmons used the tapes to correct the Halsey record that was a poorly-edited transcription of the notes taken at trial.

The appellant asserts that Simmons should not have used the tapes to correct the record. For this proposition, the appellant cites *Valenzuela v. State*, 940 S.W.2d 664, 666 (Tex.App.—El Paso 1996, no pet.), and *Ex parte Occhipenti*, 796 S.W.2d 805, 807 (Tex.App.—Houston [1st Dist.] 1990, no pet.). These cases are distinguishable.

In *Valenzuela*, the defendant's attorney requested that the official court reporter provide him with certified tapes of the proceedings so that preparation of the record would be less expensive. The El Paso Court of Appeals supported its decision to deny Valenzuela's request with many reasons. Chief among them was the fact that the "Rules of Appellate Procedure provide for preparation of the record on appeal by the clerk of the trial court and the court reporter who transcribed the proceeding and do not contemplate preparation of the appellate record by a party or his counsel." *Valenzuela*, 940 S.W.2d at 666. The Court of Appeals also noted that the reporter's record in a criminal case may consist of a transcription of the tapes only when authorized by the Court of Criminal Appeals. *Ibid.* Because the use of tapes as the reporter's record was not authorized in Brewster County, the court reporter was not authorized to certify the tapes as the official reporter's record. *Ibid. Valenzuela* is distinguishable from the appellant's case because the tapes in the appellant's case were used to edit the record that was created from Halsey's notes from trial.

Appendix A

In *Ex parte Occhipenti*, a civil case, tapes were made, but no notes were made of the trial court proceedings. The Court of Appeals held that it could not consider the tapes because the Texas Supreme Court had not authorized Harris County district courts to use tape recordings as the certified record. *Occhipenti*, 796 S.W.2d at 807. Once again, the record in the appellant's case is a transcription of Halsey's notes that was edited with the assistance of the tapes. The appellant's case is distinguishable from *Occhipenti* on that basis.

The appellant also asserts that *Bond v. State*, 694 S.W.2d 622, 623 (Tex App.—Beaumont 1985, pet. ref'd), supports her claim that the record in this case cannot be used to decide her appeal. In *Bond*, the Court of Appeals reversed the conviction because the court reporter could not take notes during part of the State's closing argument because the prosecutor was speaking too quickly for the reporter's ability. It was later found that the tape was faulty and did not record the argument. *Ibid.* The question in the case was whether the defendant had failed to exercise due diligence in failing to object to the missing portion of the record when it was discovered. The Court held that the defendant need be diligent only in requesting the transcription of the record and that when, through no fault of his own, the defendant is deprived of the record, an appellate court cannot affirm the conviction. *Ibid.* The appellant's case is distinguishable because she has not shown that she has been deprived of the record.[18]

---

18. There was no tape for the proceedings from the morning session on October 21, 1996. The record from that proceeding is found in the first 54 pages of Volume 10. We address that portion of the record in the appellant's second point of error.

The appellant also directs us to *State Farm Fire & Cas. Ins. Co. v. Vandiver*, 941 S.W.2d 343 (Tex.App.—Waco 1997, no pet.). In that case, the court reporter failed to take notes of portions of depositions that were read into the record. The Court of Appeals held that the tapes could be used to establish the pages and lines of the depositions and that the record could be supplemented with the parts of the depositions. *Id.* at 343. The Court of Appeals specifically rejected its prior holding that the use of materials other than the notes taken at trial to supplement the reporter's record would constitute a new record. *Id.* at 349 (overruling *Home Ins. Co. v. Hambric*, 906 S.W.2d 956 (Tex.App.—Waco 1995, no pet.)). The appellant argues that her case is distinguishable from *Vandiver* because the procedure in that case was dependent on the existence of "a proper written transcription of the testimony made at the time the deposition was given." *Ibid.*

The State argues that *Vandiver* stands for the proposition that courts can use materials other than the official notes taken during proceedings to obtain an accurate reporter's record. The Court of Appeals said that:

> While it cannot be denied that a contemporaneous verbatim recording of the events at trial is a large part of ensuring that a complete and accurate record of the trial court proceedings is prepared, the conclusion does not follow that the record will necessarily be incomplete in every instance where there is some absence of a contemporaneous verbatim recording.

Ibid. In *Vandiver*, portions of several exhibits and depositions were read to the jury. An audio recording of every instance where this occurred was made by the court reporter. There was no contention that what was read at trial differed in any way from the actual wording of the relevant exhibits and depositions. In addition, it was undisputed that the court reporter, by listening to the audio tapes to find where the portions of these exhibits and depositions began and ended, could reconstruct the very testimony that was missing from the original statement of facts. Therefore, the Court concluded that the statement of facts could be properly supplemented with the exhibit and deposition testimony that was missing from the original statement of facts. *Ibid.*

We agree with the State's reading of *Vandiver* and we adopt the reasoning of *Vandiver.* In this case, Simmons corrected the Halsey record with tapes that allowed her to reconstruct the testimony despite the inaccurate editing performed by Halsey and her scopists.

Simmons and Mullins testified that it is a common practice for court reporters to use tape back-ups in the preparation of any record to correct the notes taken at trial and to make the record as accurate as possible. The situation in the appellant's case is similar to when a court reporter is unable to certify a record due to death or disability. Halsey lost her certification and was unable to correct and certify the record herself. The procedure Simmons used is the same as that used when a court reporter is disabled or dies before the record can be transcribed and certified. Simmons testified that she had used the same procedure in the past.

Appendix A

The appellant claims that the procedure is flawed because Simmons did not transcribe the notes. The machine used to record the notes translates the symbols to English. Simmons testified that the problem with the Halsey record was that it had been edited improperly. Transcribing Halsey's notes would not have changed the process of correcting the record with the use of the tapes. Therefore, it was not necessary.

In *Williams v. State*, 427 S.W.2d 868 (Tex. Crim. App. 1967), we approved of a similar procedure in a case when the court reporter died before preparing and certifying the record. *Id.* at 870, 872. We said:

> We fail to see what more the able trial judge in the case at bar could have done under the circumstances. An appellant is not entitled to reversal merely because of the death of the court reporter. Here the trial judge availed the appellant and his counsel of three different opportunities to demonstrate why the statement of facts as finally prepared and approved were not a full, accurate and complete transcription of the court reporter's notes taken at the trial. He certainly had his day in Court upon the settlement of the record. In absence of a showing made that the record before us is not what occurred at the trial and that the appellant's rights were prejudiced, we overrule appellant's first ground of error.

Id. at 872. The death or disability of a court reporter, without more, does not entitle the appellant to a new trial. Likewise, that a court reporter has lost her certification, without more, does not entitle the appellant to a new trial.

The appellant admits that the use of another court reporter and backup tapes is a common practice when a court reporter is unable to complete and certify the record, but she says that Simmons used the tapes to make more than 30,000 substantive changes to the record without systematically reviewing the notes. The appellant fails to point to any specific corrections made by Simmons that show that the Simmons record is incomplete or inaccurate. The appellant argues that, if the court reporter can use tapes to make so many substantive changes to the record without a hearing, she should be required to follow the rules to protect the integrity of the tapes. *See* Tex. R. App. P. 13.2(e).[19]

There is no threshold number of changes that triggers Rule 13.2(e). And, no matter the number of corrections made, the appellant has not even attempted to show that the record is incomplete or inaccurate. Simmons used all the materials provided her to revise the record.

The appellant also directs us to *Soto v. State*, 671 S.W.2d 43, 44-46 (Tex.Crim.App.1984). In that case, we held that a record created from tapes of proceedings was unacceptable. The defendant had requested that a court reporter record proceedings in his case. The trial court denied the defendant's request because no court reporter was available. The county clerk made tape recordings of the proceedings instead. The deputy county clerk transcribed the tapes. Parts of the tapes were inaudible, and therefore the record contained gaps.

---

19. Rule 13.2(e) requires that the official court reporter "ensure that no one gains access to the original recording without the court's written order."

We granted review to determine whether former Texas Code of Criminal Procedure Article 40.09 "mandated that a certified court reporter take down and transcribe the testimony at trial or whether the trial court may employ other comparable alternative methods of insuring an appellate record is prepared, after the appellant requested that a court reporter take down the proceedings." *Id.* at 44. We held that deviating from the procedure set out in former Article 40.09 in this way was not permitted. We have said that the reasoning of *Soto* is sound today although it was an application of Article 40.09 rather than Rule of Appellate Procedure 34.6(a)(1), 34.6(e)(2), and the Appendix, Order Directing Form of Appellate Record (b)(1)(q). *See Gomez v. State*, 962 S.W.2d 572, 574 (Tex.Crim.App.1998). The requirements of the former article were incorporated in the Rules of Appellate Procedure. *Ibid.*

We conclude that the appellant's case is more like *Williams* than *Soto.* The tapes in this case were used to correct and edit the Halsey record; Simmons did not create a new record. In this case, Halsey made notes of the trial that Simmons testified were within the range of competent reporting. Simmons testified that the editing process caused the inaccuracies in the Halsey record. Simmons used the tapes and the notes from the trial to correct the Halsey record and make it conform to what occurred at trial.

(1) Tapes

The appellant also complains of the authenticity and accuracy of the tapes used by Simmons to correct the record. The unauthenticated and possibly inaccurate tapes, she argues, should not have been used to correct and certify the record.

Appendix A

The testimony during hearings on the reporter's record supports a finding that the tapes were authentic. Simmons testified that the tapes contained recordings of proceedings at trial that corresponded with the notes and Halsey's record. An assistant district attorney testified that Halsey gave him the tapes. She represented those tapes as being from the appellant's trial. Although Halsey may have lied to cover up the existence of the tapes, other independent evidence indicates that the tapes were authentic. Crowley testified that the tapes looked like the ones she used to edit the record.

The greater concern is whether the tapes are complete and accurate. The testimony given during the post-trial proceedings indicates that the trial court could have concluded that the tapes were complete and accurate. The trial judge who presided over the post-trial proceedings about the record listened to the tapes. He implicitly found that the tapes were complete and accurate because he allowed Simmons to use them to review and certify the record. Simmons testified that the tapes sounded complete, they flowed logically, and there were no audible alterations. Simmons explained that she is not an expert regarding audio recordings and that she had not been present for the proceedings in the trial. As a certified court reporter, however, she had prepared many transcripts using tapes to make corrections. Simmons had extensive experience listening to tapes of court proceedings. She testified that in the past she had prepared and certified records of other proceedings with the use of backup tapes where she had not been present for the proceedings. The appellant has failed to present any evidence that the tapes were not complete and accurate. She did not submit expert testimony about the ease with

which a tape may be altered, and she did not request an expert to test the tapes for alteration.

The appellant claims that she was not given an opportunity to compare the Simmons record to Halsey's notes. We do not address whether the trial court would have abused its discretion to deny such a request. The appellant never requested an opportunity to compare the Simmons record to the notes.

The appellant concedes that the trial court's findings are entitled to deference, but she alleges that the trial judge who presided over the post-trial proceedings did not listen to the tapes and is erroneously relying on the opinion of Simmons who is not an expert and was not present for the proceedings and had no personal knowledge thereof. Judge Robert Francis did not rely solely on the opinion of Simmons. He stated on the record that he listened to the tapes himself. Simmons was recommended by the three court reporters who reviewed the Halsey record initially. She had years of experience preparing and certifying records. And the appellant agreed to have Simmons review the record and certify it if possible. If the appellant did not trust Simmons's opinion about the accuracy and completeness of the tapes, she could have requested an expert to examine the tapes. Without more, we cannot say that the trial court erred in permitting Simmons to use the tapes to correct the record.

(2) Parentheticals

The appellant also complains about the accuracy of the parentheticals that Simmons adopted from the Halsey record,

which the trial court declared did not conform to what occurred at trial. As explained above, Simmons testified that Halsey's notes were within the range of competent reporting. The parentheticals came from that record. The trial court declared that the Halsey record did not conform to what occurred at trial and Simmons testified that the problem with the record was the editing that took place after the notes were taken. The trial court could have found that the parentheticals taken down at trial were accurate because they would not have been changed during Halsey's editing process. Simmons changed some of the parentheticals, but there is no indication and the appellant does not argue that any of these changes were material. For example, one change was to add "no response" to the parenthetical when initially it had been in the verbal text. Simmons also added the parenthetical "shakes no" when the verbal answer was, "NUm-hum," [*sic*] and she added "nod affirmatively" when the verbal answer was "Uh-hum." In another instance, the verbal answer was "Uh-huh," and Simmons changed the parenthetical from nod affirmatively to shake no. "Uh-huh" was used in other places in the record to show a negative response. Of approximately 500 parentheticals found in the voir dire portion record in a table provided by the appellant, only fifteen were changed by Simmons and none were material. *See* Tex.R.App.P. 34.6(f).

(3) Correcting the Record

The appellant argues that the Simmons record cannot be a corrected record because the official record can be corrected only if a party alleged that a specific part of the record was inaccurate and the trial court held a hearing. She claims that

no hearing was held in accordance with the Rules. The appellant is referring to Rule 34.6(e), which provides for correcting the record.[20] The Halsey record was filed with this Court before the appellant discovered any inaccuracies. When the appellant brought the specific inaccuracies to our attention, we submitted the dispute to the trial court and ordered it to ensure that the record conformed to what occurred at trial. The trial court conducted hearings, found

---

20. The complete text of Rule 34.6(e) states:

> (1) Correction of Inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.
>
> (2) Correction of Inaccuracies by Trial Court. If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must—after notice and hearing—settle the dispute.
>
> After doing so, the court must order the court reporter to correct the reporter's record by conforming the text to what occurred in the trial court or by adding an accurate copy of the exhibit, and to certify and file in the appellate court a corrected reporter's record.
>
> (3) Correction After Filing in Appellate Court. If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court.

that the Halsey record did not conform to what occurred at trial, and appointed Simmons to correct the record, if possible. Simmons was able to correct and certify that the record, with the exception of the first 54 pages of Volume 10, conformed to what occurred at trial.

The appellant cites *Little v. State*, 131 Tex.Crim. 164, 97 S.W.2d 479 (1936), for the proposition that when a court reporter died before transcription of the notes, disputes regarding the record could not be resolved in a death penalty case. The Court failed to mention whether the proceedings were recorded, but it is unlikely that in 1936 tape recorders were widely available for the use of recording court proceedings.[21] Today we have use of reliable recording devices to back up the court reporter's notes. And we have since recognized their efficacy. *See Williams*, 427 S.W.2d at 868.

The appellant is now complaining about the entire Simmons record. But unlike her complaints about the Halsey record, she has provided no specific examples of inaccuracies in the Simmons record. A global complaint that the entire record is inaccurate, in light of the procedures used in the profession and in the absence of any specific examples of inaccuracies, is not sufficient for us to conclude that the record is inaccurate.

To say that there were problems in obtaining the reporter's record in this case is a gross understatement.

---

21. Although successfully tested as early as 1935, tape recorders were not widely available in the United States until after World War II. *See* David Morton, *The Tape Recorder*, *in* OFF THE RECORD: THE TECHNOLOGY AND CULTURE OF SOUND RECORDING IN AMERICA (2000).

Appendix A

Halsey's credibility has been seriously called into question: she may have lied to the trial court about the existence of the tapes; she spoke with reporters about the problems with the record while asserting her Fifth Amendment privilege to not incriminate herself in court; she told a reporter that she hoped the appellant would not get a new trial because of the mistakes; she also told a reporter that she would not rely on the tapes because they could be altered. Other facts that tend to discount the accuracy of the record include the fact that Simmons used the same materials to create the corrected record that Halsey used to create the first record. And Halsey's record was declared to not conform to what occurred at trial. In addition, the trial judge who presided over the correction of the record had no personal knowledge of the proceedings at trial because he did not preside over the appellant's trial.

But according to Simmons, the main flaw with the Halsey record was the editing process. Although she testified that Halsey's notes contained mistakes, she also testified that the notes were within the range of competent reporting. It was the process of editing the notes, not the materials used to edit the notes, that caused there to be so many mistakes in the Halsey record. Simmons was found to be an experienced certified court reporter. Both parties agreed to have her appointed, and she was recommended by the three experts who initially reviewed the Halsey record. She testified that she was able to certify the record with the use of the tapes. And the appellant did not produce any evidence that Simmons's method was not accepted by other certified court reporters. We overrule the appellant's third point of error.

B. Second Point of Error: A Significant Portion of the Record Has Been Lost or Destroyed

In her second point of error, the appellant claims that her conviction must be reversed because a significant portion of the record necessary to her appeal has been lost or destroyed through no fault of her own. Here, the appellant is complaining about the first 54 pages of volume 10 of the Simmons record, which consisted of a transcription of the proceedings from the morning of October 21, 1996. This is the portion of the record Simmons would not certify as a true and accurate transcription of what occurred in the proceedings. Instead, she certified that it is a true and accurate transcription of Halsey's notes of the proceedings. Because the record cannot be certified either as a verbatim transcription of the notes taken at trial or as a transcription of tapes in accordance with Rule 34.6(a)(2), and because the uncertified portion of the record is necessary to the resolution of her complaint about trial counsel's conflict, the appellant asserts she is entitled to a new trial under Rule 34.6(f).

Texas Rule of Appellate Procedure 34.6(f) provides that an appellant is entitled to a new trial if a significant and necessary part of the reporter's record is lost or destroyed through no fault of her own, the appellant timely requested the record, and the parties cannot agree to the record.

Rule 34.6(f) is a relatively new rule, but the principles that brought it into being are not. It has a predecessor in the former Rules of Appellate Procedure and more than one predecessor within former versions of the Code of Criminal

Procedure. We have noted before that the cases under former versions, including Article 40.09 of the Code of Criminal Procedure, are still helpful and that the principles underlying these former versions apply to the newer rules. *See Gomez v. State*, 962 S.W.2d 572, 574 (Tex. Crim. App. 1998); *Gibbs v. State*, 819 S.W.2d 821, 828 (Tex. Crim. App. 1991).

The Rule applies whether we are faced with the loss or destruction of the entire record or only a portion of the record. *See, e.g., Harris v. State*, 790 S.W.2d 568, 574 (Tex. Crim. App. 1989) (pretrial motion); *Austell v. State*, 638 S.W.2d 888, 890 (Tex. Crim. App. 1982) (voir dire examination); *Gamble v. State*, 590 S.W.2d 507, 509 (Tex. Crim. App. 1979) (final arguments); *Hartgraves v. State*, 374 S.W.2d 888, 890 (Tex. Crim. App. 1964) (hearing on motion for new trial). We have said that "the circumstances in such cases should be viewed from the appellant's standpoint, and any reasonable doubt resolved in favor of the appellant." *Gamble*, 590 S.W.2d at 508 (citing *Young v. State*, 146 Tex.Crim. 220, 222, 172 S.W.2d 500, 501 (1943); *Lamkin v. State*, 138 Tex.Crim. 311, 317, 136 S.W.2d 225, 228 (1940)). Further, the unavailability of the record through no fault of the appellant is not immune from a harm analysis. The provision in the rule that the appellant show that the missing portion of the record is necessary to her appeal is itself a harm analysis. *Issac v. State*, 989 S.W.2d 754, 757 (Tex. Crim. App. 1999).

So, the appellant must show (1) that a significant portion of the record was lost or destroyed, (2) through no fault of her own, (3) that the missing portion of the record is necessary

to her appeal, and (4) the parties cannot agree on the record. The third requirement is dispositive of this point of error.[22]

The appellant asserts that the part of the record at issue in this point of error is essential and necessary to her appeal on two bases. First, she alleges that the first 54 pages of Volume 10 are essential to resolve her first point of error regarding a potential conflict of interest. Second, the appellant alleges that the missing portion of the record is necessary to her appeal because prospective jurors received preliminary instructions that may have been erroneous.

The appellant includes no point of error regarding the instructions given to prospective jurors. The suggestion that instructions *may* have been erroneous, without more, does not make that portion of the record necessary to her appeal. Also, as the State notes, the instructions given to prospective jurors during the morning session were virtually identical to the instructions given during the afternoon session. And Simmons testified that the afternoon session that she heard on tape was very similar to the notes from the morning session. The appellant has not shown that the portion of the uncertified record dealing with prospective jurors is necessary to her appeal.

Next, we will address whether the missing pages dealing with the substitution of counsel and potential conflict are necessary to the appeal. In her first point of error the appellant claims that her Sixth Amendment right to effective assistance

---

22. Because the third requirement is dispositive, we decline to address the other requirements of Rule 34.6(f).

of counsel was violated because her lead counsel, Doug Mulder, had an actual conflict of interest and the trial court failed to conduct a hearing on the State's motion to determine whether Mulder should be disqualified.

A close look at this point of error indicates that the appellant is not complaining about the trial court's actions on October 21, 1996. The State filed its motion on November 12, 1996, and any potential error in the trial court's failure to hold a hearing on that motion can be reviewed without reference to the uncertified portion of the record. Her complaint that the trial court did not hold a hearing on the State's motion regarding a potential conflict arises after the proceedings that are contained within the first 54 pages of Volume 10 were held. The appellant concedes as much when she says in her brief:

> Furthermore, a knowing and intelligent waiver of the conflict on October 21 would not have waived Appellant's right to object to [the conflict] on November 12, when the State disclosed new circumstantial evidence of Darin's involvement in the capital murder, unless she prospectively waived her right to raise the issue again if new evidence emerged.

Because her complaint on appeal is about the trial court's failure to hold a hearing after the State filed its motion about a potential conflict, the appellant fails to satisfy the requirement of Rule 34.6(f) because she has failed to show that the missing portion of the record is necessary to her appeal. We overrule the appellant's second point of error.

C. Fourth and Fifth Points of Error: Failure to Hold a Hearing on Objections to the Simmons Record

In the appellant's fourth and fifth points of error, she complains that the proceedings the trial court conducted about the appellant's objections to the Simmons record did not comply with the requirements of federal due process or Texas Rule of Appellate Procedure 34.6(e)(2). As a result, she claims, she is entitled to a hearing before the Simmons record can be used to decide her appeal. The appellant cites *Chessman v. Teets*, 354 U.S. 156 (1957). This case does not support the appellant's claim.

In *Chessman*, the court reporter who made notes during the trial died before he was able to transcribe them. A second court reporter, who was related to the prosecutor by marriage, took the notes and produced a record from them in part by discussing the testimony with the prosecutor and the police officers who testified at trial. Chessman was not represented in person or by counsel in the proceedings to approve the new record. The United States Supreme Court held that this procedure did not comport with due process.

> All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand.

Id. at 164.

The appellant also claims that *Lankford v. Idaho*, 500 U.S. 110 (1991), supports her claim. In that case, Lankford and his older brother were convicted of murder. Lankford was formally informed of a possible death sentence at his arraignment, but later discussions with the prosecutors, various pre-sentencing orders, and other factors led him to believe the death penalty would not be sought or imposed. After the sentencing hearing, the trial judge imposed the death penalty with no prior warning that he was considering it. *Id.* at 112-16.

The Supreme Court held that Lankford received insufficient notice that the trial court might impose the death penalty, which violated due process. *Id.* at 126. The Court explained that if Lankford had known of the possible sentence, he would have conducted his hearing differently and perhaps had a different sentenced imposed. *Ibid.* Notice of the issues to be resolved are necessary to due process. *Ibid.*

The appellant's case is distinguishable from *Chessman* and *Lankford* because the appellant and her counsel had notice of the proceedings, were present during the extensive proceedings on the certification of the Simmons record, and were given ample opportunity to make objections to the Simmons record. The proceedings conducted by the trial court to make the record conform to what happened at trial complied with federal due process. We overrule the appellant's fourth point of error.

The appellant also claims that she is entitled to a Rule 34.6(e)(2) hearing to settle disputes about the record

before it can be used to decide her appeal. The appellant asserts that the Rule requires the trial court to settle disputes about the record after notice and a hearing. Further, the appellant says that, in hearings required by the Texas Code of Criminal Procedure, the defendant must be allowed to present live testimony and cross-examine the State's witnesses unless a hearing based on documents is allowed. *See Garcia v. State*, 15 S.W.3d 533, 536 (Tex. Crim. App. 2000). She sees no reason this rule should not apply in a Rule 34.6(e)(2) hearing.

But Rule 34.6(e)(2) and its requirements apply when inaccuracies are discovered *before* a reporter's record is filed in the appellate court. In this case, the inaccuracies were discovered *after* the record was filed in this Court. The Halsey record was filed April 24, 1998. The appellant filed a motion in this Court to correct or clarify the record on October 13, 1998.

Rule 34.6(e)(3) applies when inaccuracies are discovered after a record has been filed in the appellate court. It states that: "If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court." There is no requirement that a hearing be held to correct the record after the record has been filed in the appellate court. And, as we explained above, the Simmons record is not a new record; it is the correctly-edited transcription of Halsey's notes.

Appendix A

Even if we were to assume that the Simmons record was a new record that had not been filed in this Court prior to discovery of the inaccuracies, the appellant had three opportunities to put on witnesses and ask questions about the Simmons record. Although her counsel was not permitted to ask questions of Simmons directly, counsel for both the appellant and the State were permitted to submit questions to Judge Francis who read them to Simmons. The appellant was given an opportunity to submit more questions after a break in the proceedings and again several days after the hearings. Simmons prepared the record in stages. First she prepared and submitted the record for the guilt and punishment phases. These volumes were delivered to the trial court, the appellant, and the State on April 1, 1999. And then, pursuant to this Court's order and by appointment of Judge Francis, Simmons prepared and submitted the record for voir dire and the pretrial hearings. These volumes were delivered to the trial court, the appellant, and the State on October 14, 1999. Later the parties discovered that Simmons had never received the materials to correct and certify volumes 10 and 11. Simmons was provided these materials with which she prepared and submitted corrected volumes on January 28, 2000. She followed the same procedure in preparing the entire record with the exception of the first 54 pages of volume 10, for which she had no tape, and volume 16, for which she had no edit disk but had the tape.

The appellant had over six months to review the first installment of the Simmons record and to have another expert review it for problems. When the second installment was delivered, the appellant had another opportunity to submit questions to be answered by Simmons. Then the appellant had another three months to review the portions of the record

already received before the final installment of the record was received.

After all the corrected volumes had been received, the appellant submitted her written objections to the trial court, including a request for another hearing. The State responded to the request by stating that there were no factual disputes needing to be resolved. The trial court set a hearing date but later cancelled it, finding that further proceedings were outside the scope of this Court's orders. The appellant still showed no factual disputes that required an additional hearing to be resolved.

We hold that the appellant was not entitled to a hearing under Rule 34.6(e)(2). In the alternative, we hold that the appellant had ample notice and opportunity to present live witnesses regarding her objections to the Simmons record. We overrule the appellant's fifth point of error.

D. Fourteenth Point of Error: Failure to Rule on Bill of Exception

In the appellant's fourteenth point of error, she complains that the trial court erred in refusing to rule on her formal bill of exception. Within this point of error, she claims that Rule of Appellate Procedure 33.2 requires the trial court to conduct a hearing unless the parties agree to the bill of exception.

The appellant filed her formal bill of exception September 25, 2000. It explains that on September 1, 2000, in the presence of the State and the appellant's counsel, the trial court announced that it would hold a hearing on the appellant's objections to the trial record. On the same day,

the appellant presented a written application to subpoena an out-of-state witness. The trial court orally authorized another district judge to sign a certificate granting the request. On September 6, 2000, one or more of the State's attorneys made an ex parte request to seal the appellant's motion to suppress the tapes and Halsey's statement regarding the tapes. On September 7, 2000, the trial court filed a written order canceling the hearing scheduled for the next day without giving the appellant an opportunity to be heard on the matter.

The State makes several arguments in response. It argues that the appellant's formal bill of exception failed to (1) identify issues that could not be resolved from the existing records or (2) include evidence that the appellant wished to produce at a hearing. It also argues that pursuant to *Lewis v. State*, 711 S.W.2d 41, 43 (Tex. Crim. App. 1986), and the cases cited therein, the trial court had authority to act only within the scope of the order abating the case. Because the order abating the case gave the trial court authority to make the reporter's record conform to what occurred at trial, the State argues, the trial court did not have authority to rule on the appellant's formal bill of exception. The State's final argument is that the trial court's failure to act on the appellant's bill of exception was harmless. It states that the matters in the bill are generally reflected in the record and do not support her claims on appeal.

The appellant failed to identify in the formal bill of exception claims that she could not have presented on appeal. On September 25, 2000, the appellant filed her formal bill of exception. The trial court issued an order on October 3, 2002, stating that it had no jurisdiction to consider the

appellant's pleadings because the case had already been returned to this Court.

We will assume without deciding that the appellant's request to make a formal bill of exception was within the scope of this Court's orders to the trial court to make the record conform to what occurred at trial. Even so, much of the information included in the appellant's formal bill of exception was already in the record forwarded to this Court. The remaining information does not relate to the appellant's claims on appeal. And, as the State argues, the appellant has failed to point to any claims on appeal she could not make because of the trial court's failure to rule on her formal bill of exception. Therefore, she has failed to show she was harmed. Tex.R.App. P. 44.2(b). We overrule the appellant's fourteenth point of error.

E. Eleventh, Twelfth, and Thirteenth Points of Error: Providing Jury with an Inaccurate Transcription of the Record

In her eleventh, twelfth, and thirteenth points of error, the appellant claims that the trial court violated Code of Criminal Procedure Articles 36.27 and 33.03 and Fourteenth Amendment Due Process by providing the jury with an inaccurate transcription of Darin Routier's testimony while the appellant was not present. The State responds that the trial court did not err because (1) the appellant's attorney waived her presence at the in-chambers discussion of the jury note and the trial court's response and (2) the record reveals no harm because the inaccurate portions of the record were immaterial to the jury's questions.

Appendix A

During the jury's deliberations on the question of the appellant's guilt, the jury sent a note to the trial court stating, "Some of us remember hearing Darin say that he did not lock the door from the utility room to the garage before he went to bed, 6/5/96, the rest of us remember that Darin said he locked this door. Which is right?" RR 46:5358. Before a meeting in chambers with three of the appellant's attorneys and one of the prosecutors, the trial court had the court reporter prepare an excerpt of the relevant testimony. The trial court provided copies to the attorneys and asked if they had any objections. The attorneys stated on the record that they had no objections to providing the jury with the excerpt.

Then the trial court noted that the appellant herself was not present for this meeting. The trial court asked the appellant's attorneys, Mulder and Mosty, if they waived the appellant's presence at that meeting. Mulder and Mosty each said that they waived the appellant's presence. The excerpt was sent to the jury.

(1) Articles 33.03 and 36.27

The appellant argues that she had a right under Article 33.03 to be present when the court responded to the jury's request.[23] She failed to object at the earliest opportunity that

---

23. Code of Criminal Procedure Article 33.03 reads, in full:

> In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided,

(Cont'd)

her rights under these Articles were violated. Thus, she has failed to preserve error. Tex.R.App. P. 33.1. Nonetheless, in an abundance of caution, we will address the merits of the appellant's claim.

Article 33.03 provides criminal defendants with a statutory right to be present during their trials. It also allows criminal defendants to be absent, if they choose, after pleading to the indictment in a bench trial or after jury selection in a jury trial.

The appellant cites *Hill v. State*, 54 Tex.Crim. 646, 114 S.W. 117 (1908), in support of her claim. In that case, the Court found reversible error when a defendant voluntarily absented himself from his proceedings even though his attorney waived his right to be present. *Id.* at 650, 114 S.W. at 119. The Court applied no harm analysis because that decision predated the adoption of the Rules of Appellate Procedure.

(Cont'd)

> however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial. Provided, however, that the presence of the defendant shall not be required at the hearing on the motion for new trial in any misdemeanor case.

Appendix A

The record does not reveal why the appellant was not present. The record shows that the appellant's attorneys waived her presence. The appellant does not allege that the waiver was erroneous, and she does not allege that she was not aware of the proceedings. She has not shown that the trial court erred in accepting her attorneys' waiver of her presence.

Article 36.27[24] provides a procedure in the event jurors have questions about the case. Before answering a jury's

---

24. Code of Criminal Procedure Article 36.27 reads, in full:

> When the jury wishes to communicate with the court, it shall so notify the sheriff, who shall inform the court thereof. Any communication relative to the cause must be written, prepared by the foreman and shall be submitted to the court through the bailiff. The court shall answer any such communication in writing, and before giving such answer to the jury shall use reasonable diligence to secure the presence of the defendant and his counsel, and shall first submit the question and also submit his answer to the same to the defendant or his counsel or objections and exceptions, in the same manner as any other written instructions are submitted to such counsel, before the court gives such answer to the jury, but if he is unable to secure the presence of the defendant and his counsel, then he shall proceed to answer the same as he deems proper. The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant.

All such proceedings in felony cases shall be a part of the record and recorded by the court reporter.

question, the trial court should use reasonable diligence to secure the defendant's and her counsel's presence. The appellant does not allege that the trial court failed to use reasonable diligence in obtaining her presence. The appellant's only quarrel with the trial court's procedure is that she was not present for the proceedings when the trial court read the jury's question to the attorneys for her and the State and when the trial court read its proposed response. The appellant has not explained the reason for her absence from this meeting. She still does not allege that she was unaware of the proceedings. The trial court did not err in accepting her attorneys' waiver of her presence.

(2) Federal Due Process

The appellant claims that the trial court also violated her constitutional right to be present at a critical stage in her trial. She claims that she had a right to be present because the proceeding had a substantial relationship to her ability to defend herself. The State argues that the appellant, through her counsel, waived her right to be present.

The appellant cites *Adanandus v. State*, 866 S.W.2d 210 (Tex. Crim. App. 1993), in support of her claim. In that case, the defendant was not present for a pretrial meeting in the judge's chambers regarding a television reporter's recording of potential jurors as they entered the courtroom. In accord with the United States Supreme Court's holdings, we said that a defendant's right to be present is triggered when the proceedings bear a substantial relationship to the opportunity to defend. *Id.* at 219 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-08 (1934)).

In this case, the appellant claims that because the testimony was not about trivial or insubstantial matters, her due process right to be present was triggered. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Supreme Court outlined the parameters of a defendant's due process right to be present at a proceeding. The Court said "whenever [the defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" the defendant has a right to be present. The "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 105-106, 108.

The appellant has failed to show that a fair and just hearing was thwarted by her absence, especially since her attorneys were present and waived her right to be present. In the absence of a showing that the waiver was erroneous, we cannot say that the trial court violated the appellant's federal due process right to be present for the proceeding.

(3) Harm Analysis

Even if we were to assume that the trial court erred, the appellant could not prevail under either the constitutional or the nonconstitutional error standard. *See* Tex. R. App. P. 44.2(a) & (b).[25] An appellant is harmed by a constitutional

25. Rule 44.2 Reversible Error in Criminal Cases.

(a) Constitutional error.

If the appellate record in a criminal case reveals constitutional error that is subject to harmless error

(Cont'd)

error unless after reviewing the record, the reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2; *Chapman v. California*, 386 U.S. 18, 24 (1967). Any nonconstitutional violation is reviewed under the standard explained in *Johnson v. State*, 967 S.W.2d 410 (Tex. Crim. App. 1998), in which we said "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Id.* at 417.

The appellant asserts that she was harmed because the trial court gave incorrect information to the jury in her absence. The record does not support the appellant's claim.

The jury had a dispute about Darin's testimony that he had locked the garage door and the front door, but not the utility room door on the night of the murders. The State impeached Darin with testimony from the pretrial bond hearing at which he testified that he had locked all the doors in the house. Darin explained the discrepancy by stating that

---

(Cont'd)

> review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.
>
> (b) Other errors.
>
> Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

he probably misunderstood the question asked at the bond hearing.

The portion of the testimony given to the jury follows. The markings show the portions altered in the Simmons record.

State: Okay. The garage door, you just testified a few minutes ago, that when you were out there with the inventory for the garage sale that the garage door was up, correct?

Darin: *Well* it was up when I was out there I had pulled it down before I went to bed.

State: All right. So, before you ever went back inside that house, you closed it and you latched it, didn't you?

Darin: *I* latched it from the inside.

State: *Mat[t]er* of fact you locked the doors, you locked both the front and the back doors *to* the residence before you went to bed, didn't you?

Darin: No, sir I didn't. I locked the front door and only the garage door. I never locked the door between the garage and the utility room.

State: Sir, on September the 12th of *1996*, do you remember me asking you the question, after we had talked about the garage door: "And the other

doors in the house were locked when you *when* to sleep also?" Do you remember what your answer was back then, Mr. Routier?

Darin: That they *are* all locked.

State: Would you like for me to show you your answer?

Darin: If you would, yes, sir.

State: *Okay.* I'll be happy to. *All right.* My question began on page 168 *of* line 3, your answer was at line 5 do you see your answer?

Darin: "*And* the other doors in the house, they were locked when you went to bed?"

State: Yes, sir. And your answer was: "Yes, sir." Correct?

Darin: Yes, sir. "The garage door and the front door were locked."

State: You see, that is not the question that I asked back on September the 12th, was it? I didn't say, "Did you lock the garage door and the front door, that is not the question that I *asked, is it?"*

Darin: You said all doors.

State: I said the other doors in the house, you understood what I meant back then, didn't you?

Darin: Well, I'm not really sure if I did or not.

State: Sir, that is your house, *you don't have any other doors*, you have a front door, a door to the garage and *the* garage door, don't you?

Darin: And a sliding glass door and 48 windows.

State: That's right. *As a* matter of fact, the sliding glass was also locked, wasn't it?

Darin: Yes, sir, it was. All exterior doors were locked.[26]

---

26. The text of the Simmons record with underlines marking differences in the text is as follows:

State: Okay. The garage door, you just testified a few minutes ago, that when you were out there with the inventory for the garage sale, *that the window*—that the garage door was up; correct?

Darin: *The garage door*, it was up when I was out there, I had pulled it down before I went to bed.

State: All right. So before you ever went back inside that house, you closed it, and you latched it, didn't you?

Darin: Latched it from the inside.

State: *Matter* of fact, you locked the doors, you locked both the front and the back doors *of* the residence before you went to bed, didn't you?

(Cont'd)

Appendix A

(Cont'd)

Darin: No, sir, I didn't. I locked the front door and only the garage door. I never locked the door *in* between the garage and the utility room.

State: Sir, on September the 12th of '96 do you remember me asking you the question, after we had talked about the garage door: "And the other doors in the house were locked when you *went* to sleep also?" Do you remember what your answer was back then, Mr. Routier?

Darin: That they *were* all locked.

State: *Would you like for me—*

Darin: *I would—*

State: Would you like for me to show you your answer?

Darin: If you would, yes, sir.

State: I'll be happy to. My question *begins* on page 168 *at* line 3. Your answer was at line 5. Do you see your answer?

Darin: "The other doors in the house they were locked when you went to bed?"

State: Yes, sir. And your answer was: "Yes, sir." Correct?

Darin: *Yes, sir.*

State: *Okay.*

(Cont'd)

Appendix A

Sic passim. The allegation that the jury received incorrect substantive information is unfounded. The changes Simmons made to the portion of Darin's testimony excerpted for the jury during its deliberations were immaterial and did not change the substance of the testimony. The testimony as presented in the excerpt and as presented in the Simmons

---

(Cont'd)

Darin: The garage door and the front door were locked.

State: You see, that is not the question that I asked back on September the 12th *though*, was it? I didn't say, "Did you lock the garage door, and the front door?" That is not the question that *I asked, did I?*

Darin: You said all doors.

State: I said the other doors in the house. You understood what I meant back then, didn't you?

Darin: Well, I'm not really sure if I did or not.

State: Sir, that is your house. *You know how many doors.* You have a front door, *and* a door to the garage and *you have a* garage door, don't you?

Darin: And a sliding glass door, and 48 windows.

State: That's right. Matter of fact, the sliding glass was also locked, wasn't it?

Darin: *Yes, sir*, it was.

State: *Okay.*

Darin: *All exterior doors were locked.*

record supported the appellant's theory of the case. In addition, the appellant has not raised any claim on appeal that inaccurate information was provided to the jury. Her only complaint is that she was not present when the trial court held a meeting regarding the jury's note.

The appellant also argues that she was harmed by her absence because she probably could have recognized the mistakes in the transcript of her husband's testimony about locking the doors and windows because she knew the witness and the facts. But the record fails to show, and the appellant fails to identify, any specific facts that she could have pointed out to the trial court that her attorneys could not have.

Even if we assumed that the trial court erred in allowing the appellant's attorneys to waive her right to be present, the record supports beyond a reasonable doubt the conclusion that any potential error did not contribute to the jury's verdict. We overrule the appellant's eleventh, twelfth, and thirteenth points of error.

II. First Point of Error: Conflict of Interest in Attorney's Representation

In the appellant's first point of error, she claims that she was deprived of her Sixth Amendment right to effective assistance of trial counsel because her lead counsel, Doug Mulder, had a conflict of interest, of which the trial court was aware, and the trial court failed to have a hearing on the State's motion to determine whether Mulder should be disqualified. Specifically, the appellant claims that Mulder's representation of the appellant's husband, Darin Routier,

at a show-cause hearing on the alleged violation of a gag order prevented Mulder from pursuing a trial strategy to show that Darin could have committed the murder with which the appellant was charged.

A. Facts

On September 19, 1996, the State filed a motion to discharge the appellant's appointed attorneys because Mulder had informed the trial court on September 12, 1996, that he had been retained to represent the appellant. The trial court held a hearing on September 20, 1996, on the allegations that Darlie Kee, the appellant's mother, and Darin Routier, the appellant's husband, had violated a gag order imposed by the court by talking about the case on the radio. The gag order prohibited witnesses or prospective witnesses from talking about the expected testimony of the appellant or any witness, the character, reputation, or credibility of any witness, the contents of any statement given by the appellant, and the nature of evidence that might be presented.

At the beginning of the hearing, Mulder said, "I am retained by Ms. Kee to represent her and she has asked me to represent Darin as well, I didn't know that until this morning." Mulder did not introduce any evidence or call Darin as a witness. The trial court asked questions of Darin without placing him under oath. The trial court found that Darin had not violated the gag order because he did not discuss prohibited information.

At the end of that hearing, the trial court took up the State's motion to dismiss the appellant's court-appointed

attorneys. The trial court asked Darin whether he had retained Mulder to represent the appellant for the trial. Darin replied that he had not and that he was unaware of any arrangements to have Mulder represent the appellant. The trial court then asked Mulder if he had been retained to represent the appellant. Mulder explained that he had been retained by Darlie Kee to assist the appellant's court-appointed attorneys. The trial court explained that Mulder could consult with Darlie Kee and the appellant's attorneys if they wished and that he could be present in the courtroom during the proceedings. But the trial court explained that Mulder was not counsel of record and could not question witnesses or make any objections or motions. There was a short recess, after which the trial court explained to Mulder that, if he wanted to become counsel of record, he would be required to file a formal motion for substitution of counsel.

Mulder filed a motion to substitute himself and three other attorneys for the appellant's appointed counsel. On October 21, 1996, the first day of jury selection, the trial court held a hearing on the motion. The uncertified record for the proceedings indicates that Mulder and three other attorneys had been retained by the appellant's family to represent her at the trial. Mulder was asked if he would be ready to start the trial right away, to which Mulder replied that he was ready to start without delay. The trial court asked the appellant whom she wanted to be her attorney. The appellant stated that she wanted Mulder to represent her at the trial. The trial court asked the appellant if she waived any potential conflict regarding Mulder's representation of Darlie Kee. The appellant responded that there was no conflict. The trial court granted the motion for substitution

of counsel without mentioning Mulder's representation of Darin Routier.

On November 12, 1996, the State filed a motion to determine whether Mulder had a conflict of interest regarding his representation of Darin Routier. The State's motion stated that Mulder knew, when he was substituted as counsel for the appellant, that the State disbelieved the appellant's claim that the murders were committed by an unknown intruder. Mulder also knew that Darin Routier was the only other adult in the house that night, and that the State was continuing its investigation. The State then explained that "[r]ecent analysis of physical evidence suggest[ed] that Darin Routier may have participated with the [appellant] in the crime or coverup of the crime." It requested that the trial court hold a hearing to determine whether (1) a conflict existed for Mulder, (2) the appellant would waive any potential conflict, and (3) Darin Routier would waive any potential conflict. The recent analysis of which the State spoke in its motion included a white tube sock found in the alley behind the Routiers' home on which was found the blood of both children, a faint trace of the appellant's DNA, and fibers from Darin's sneakers. Also, the knife that inflicted the children's and the appellant's wounds was found to have a head hair that matched a known sample of Darin Routier's head hair.

On the day the State filed its motion, the trial court discussed having a hearing on the motion. The trial court stated on the record that it believed that the appellant and Darin Routier had already waived any potential conflict on the first day that proceedings were conducted in Kerrville, October 21, 1996. The appellant agreed with the trial court

that both she and Darin had waived any potential conflicts on that day. The prosecutor presenting the State's motion explained that the State had discovered new evidence and that the State wanted "to make real sure." The trial court said that it would hold a hearing after jury selection was completed.

On November 18, 1996, the trial court addressed the conflict motion on the record again. The trial court said, "On the 21st, as I recall, I put Ms. Kee under oath, Mr. Routier under oath, the [appellant], under oath for this purpose only. And they both waived any conflicts that may exist. Has anything happened since then?" One of the appellant's attorneys, Richard Mosty, replied, "Our response, that [the appellant] signed last week further reconfirms that." The response to which Mosty refers cannot be found in the record.

B. Analysis

The appellant claims that Mulder's representation of Darin Routier while Darin was a suspect created a conflict of interest that foreclosed a strategy of shifting responsibility for the murders to Darin Routier. The appellant argues that this actual conflict requires reversal because the trial judge failed to have a hearing on the conflict.

The State claims that no conflict arose from Mulder's limited representation of Darin Routier for purposes of the gag order. Moreover, three other attorneys represented the appellant during the trial. The record does not show an actual conflict of interest of which the trial court should have been aware.

Ineffective assistance of counsel may result from an attorney's conflict of interest. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Two different situations have been discussed by the United States Supreme Court regarding conflicts of interest. The distinguishing factor is whether the defendant or his attorney objected during the trial. *Compare Holloway v. Arkansas*, 435 U.S. 475, 484 (1978), *with Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

When the appellant or his attorney has brought a potential conflict of interest to the attention of the trial court, the Supreme Court has said that the trial court has an obligation to investigate and determine "whether the risk of the conflict of interest is too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484.

If the appellant and his attorney fail to bring the potential conflict to the attention of the trial court and the appealing defendant relies on the argument that the trial court should have been aware of the conflict, the defendant cannot obtain a reversal on appeal unless he shows that his attorney was operating under an actual conflict of interest that adversely affected counsel's performance. *Sullivan*, 446 U.S. at 348. No additional showing of harm or prejudice is required. *Id.* at 349-50. We have said that an actual conflict of interest exists when "counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps his own) to the detriment of his client's interest." *James v. State*, 763 S.W.2d 776, 779 (Tex. Crim. App. 1989).

The appellant claims a third category is suggested by *Wood v. Georgia*, 450 U.S. 261 (1981), when the prosecutor raises the issue and the "facts demonstrate convincingly the duty of the [trial] court to recognize the possibility of a disqualifying conflict of interest." *Id.* at 272-73. In *Wood*, three defendants had been convicted of distributing obscene materials and placed on probation. The defendants had all been represented by an attorney hired by their employer. Their probation was later revoked. The employer's attorney represented them in the revocation hearing. The employer had promised the defendants that he would pay the fines imposed by the trial court when they were put on probation. The motion to revoke probation was filed because neither the defendants nor their employer paid the fines. The record indicated that the employer had an interest in creating equal protection jurisprudence favorable to him. The attorney's strategy in representing the employer's interest rather than the defendants' interest in obtaining leniency indicated that the attorney was actively representing the employer's interests and not those of the defendants. The defendants did not object to their attorney's conflict, but the State made the trial court aware of the conflict. *Id.* at 265-67.

The Supreme Court granted certiorari on an equal protection question but was unable to address it because the Court could not be sure that counsel was not influenced in his basic strategic decisions by the employer's interests. *Id.* at 264-65. As a result, the Court remanded the case for the trial court to determine whether an actual conflict of interest existed. *Id.* at 273-74. The Supreme Court has since made it clear that it did not create a third category in *Wood.*

Appendix A

In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Supreme Court corrected the lingering confusion left by *Wood*. In *Mickens*, the petitioner argued that the remand instruction in *Wood* created a rule that required reversal when a trial court fails to inquire into a potential conflict, even in the absence of the defendant's showing that the representation was affected by the conflict of interest. The petitioner found it significant that the remand order in *Wood* directed the trial court to grant a new probation revocation hearing if it found that an actual conflict of interest existed.

The Supreme Court explained that the reference to an actual conflict of interest in *Wood* meant a conflict that affected counsel's performance. "It was shorthand for the statement in *Sullivan* that 'a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.' " *Mickens*, 535 U.S. at 171 (quoting *Sullivan*, 446 U.S. at 349-50) (emphasis added in *Mickens*). The Supreme Court said explicitly that it did not create a new rule of law in *Wood*. *Id.* at 172.

(1) Did the appellant object during trial?

The record indicates that neither the appellant nor her attorney objected to Mulder's representation on the basis that a conflict of interest existed. The State filed a motion requesting a hearing for the trial court to determine whether a conflict existed. In reference to the motion, the following colloquy occurred on November 12, 1996.

Trial Court: All Right. Let's put on the record. I have in my possession notice of motion, notice of possible conflict of interest, by Gregory Davis, an Assistant District Attorney from Dallas asking me to ascertain whether or not Mr. Mulder has any conflict of interest in this case. And I believe that the record will reflect that I have already asked these same questions of Mr. Mulder when we first started and that [the appellant] previously waived any conflict of interest. Is that not so, [appellant]?

Appellant: Yes, yes sir.

Trial Court: And I believe that your husband Darin Routier also knowingly and intentionally waived any conflict of interest.

Appellant: Yes, he did.

Trial Court: I think that was all in the record. Was it not?

Appellant: It was asked to us at the beginning when we changed.

Trial Court: That is my recollection of things.

Appellant: Yes, sir.

Trial Court: We did that the first day here, didn't we

Toby Shook:[27] I think so.

Appellant: We did it that day, but you had asked me when I was changing attorneys.

Trial Court: Yes, ma'am. But I mean in Kerrville. We did it right then and there.

Appellant: Yes.

Trial Court: As I recall it, it was the first day before the jury, change of venue and all that, before we got into jury selection.

Sherri Wallace:[28] Judge I think this is new evidence and Greg [Davis] just wanted to make real sure. There is some new evidence.

Trial Court: Well, I will tell you what will do. We will have a hearing all over and I will ask [the appellant] and I will ask Mr. Routier again. I'm sure we will see what the questions are.

Appellant: I know you have to go through that procedure but the questions will be—.

---

27. Toby Shook is an assistant district attorney who represented the State during the trial in this case.

28. Sherri Wallace is an assistant district attorney who represented the State during the trial in this case.

Trial Court: Well, I feel I will not be surprised at the same answers. Thank you. But we will do it after we get this jury picked.

Appellant: Yes, sir.

Sic passim.

Again, on November 18, 1996, the trial court referenced the State's motion.

Trial Court: Now I have several motions. I have a motion filed last week considering any conflict of interest that Mr. Mulder might have. The Routiers, I think, we have already waived that. We have got him on the record when they came down here the first day. Was it not Miss Halsey?

Court Reporter: Yes, sir.

Trial Court: On the 21st, as I recall, I put Ms. Kee under oath, Mr. Routier under oath, [the appellant] under oath for this purpose only. And they both waived any conflicts that might exist. Has anything new happened since then?

Richard Mosty:[29] Our response, that [the appellant] signed last week further reconfirms that.

---

29. Richard Mosty is one of the attorneys who represented the appellant during the trial in this case.

Trial Court: That's right. She reconfirmed it last week. Now we can have a brief hearing when we start this on the 6th if everybody wants to, but I'm quite sure the answers will be the same.

Sic passim.

The record shows that the appellant, Mulder, and her other three attorneys made no objection on the basis of any potential conflict of interest on the basis of Mulder's representation of Darin Routier. As a result, the *Sullivan* standard applies, and to obtain relief, the appellant must show that (1) an actual conflict of interest existed, (2) which affected Mulder's representation of the appellant. *Sullivan*, 446 U.S. at 349-50.

(2) Has the appellant shown that an actual conflict of interest existed?

The appellant argues that Mulder had an actual conflict of interest because there was a plausible alternative defensive strategy that he could not have pursued in the appellant's case without violating his duty of loyalty and confidentiality to Darin Routier, who was a suspect, a prosecution witness, and a former client in a substantially related case.

The State claims that Mulder represented Darin Routier for the gag order hearing only, which was not substantially related to the capital murder case. The State also claims that Mulder was not actively representing conflicting interests during the trial.

We have said that an actual conflict of interest exists when "one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." *James v. State*, 763 S.W.2d 776, 779 (Tex. Crim. App. 1989).

We agree with the State that Mulder's representation of Darin Routier was related only tangentially to his representation of the appellant. The only issue in the show-cause hearing was whether Darin had violated the order prohibiting potential witnesses in the case from discussing the expected testimony of the appellant or of any witness; the character, reputation, or credibility of any witness; the contents of any statement given by the appellant; and the nature of evidence that might be presented. The trial court found that Darin had not violated the gag order because he had not discussed any of the prohibited topics in his radio interview. As a result the trial court did not hold him in contempt. Mulder's minimal participation in Darin's defense at the gag order hearing cannot be said to be substantially related to Mulder's defense of the appellant in her capital murder trial.

Even if we were to accept the appellant's claim that the proceedings were substantially related, the appellant has not shown that any actual conflict of interest arose. *James v. State*, is analogous to this case. James and his co-defendant were tried in the same case and represented by the same attorney. Both defendants relied on alibi defenses that were independent of one another and the testimony at trial was consistent with the strategy that both defendants were

innocent. On appeal James claimed that he could have shifted blame to his co-defendant if they had not had the same attorney. After explaining that no evidence supported that James was interested in pursuing this strategy, we said:

> What evidence we do have comes in the form of speculative argument from appellants' counsel on appeal, later adopted by the appeals court in analyzing the issue. Again in his response to the State's petition for discretionary review, appellant underscores the point that the appeals court opinion was based upon the "likelihood that the defense attorney could have, would have and should have" advanced evidence and arguments advantageous to each defendant but did not do so because of the multiple representation problem.

Id. at 781. We explained that a potential conflict may become an actual conflict, but we decline to speculate about a strategy an attorney might have pursued, but for the existence of a potential conflict of interest, in the absence of some showing that the potential conflict became an actual conflict.

We note that Mulder's representation of Darin did not amount to the joint representation at issue in *James*. Even if it did, nothing in the record supports a conclusion that an actual conflict of interest arose. Mulder did not know he was representing Darin until the morning of the gag order hearing. Also, Mulder had no direct knowledge of Darin's actions regarding the gag order; he put on no evidence in defense of Darin, who was never charged with any crime in connection with the murders. Darin and the appellant were not

codefendants. The State never suggested during the trial that Darin was involved in the murders. During closing arguments of the guilt phase of the trial, the State focused on identity; prosecutors said that either an unknown intruder killed the two boys or the appellant did. They argued that the evidence supported finding the appellant guilty. The State also notes that Darin was a witness for the defense whose testimony was consistent with the appellant's theory of the case. The appellant testified that an unknown intruder stabbed her and her children and that Darin was not involved.

The appellant attempts to distinguish *James* on the bases that prejudice must be presumed because the trial court did not hold a hearing and that there was substantial evidence to support a plausible alternative defensive theory.

As we explained above, prejudice is not presumed just because the trial court failed to hold a hearing after the State's motion was filed. We presume prejudice from the failure to hold a hearing only when the defendant or her attorney objects on the basis of a potential conflict. In the absence of an objection, the defendant is required to show that an actual conflict of interest existed that adversely affected the representation.

In *James*, we distinguished other cases in which we had held that an actual conflict developed during the trial. Those cases were *Ex parte McCormick*, 645 S.W.2d 801 (Tex. Crim. App. 1983), *Ex parte Parham*, 611 S.W.2d 103 (Tex. Crim. App. 1981), and *Gonzales v. State*, 605 S.W.2d 278 (Tex. Crim. App. 1980). In each case, the record demonstrated that counsel ~~had to fo~~rego an effective strategy or that a

strategy backfired due to an actual conflict that arose during trial. We said:

> In each of these cases the potential for conflict inherent in multiple representation became an actual conflict due to the inculpatory or exculpatory nature of testimony or the strategy adopted by defense counsel in the particular case. That is not reflected in the case before us today. Each appellant had a distinct alibi supported, albeit sometimes weakly, by separate witnesses. Each appellant testified, in effect bolstering both alibi defenses. There is no conflict between the testimony of these appellants, the testimony in effect bolstering an individual appellant's own defense, a potential conflict does not rise to the level of an actual conflict of interest. In line with this, we hold that the testimony between alibi witnesses for appellants in no way conflicted with either defense, and an actual conflict of interest has not been shown.

James, 763 S.W.2d at 781-82 (citation omitted). The appellant's case is more analogous to *James* than to *McCormick*, *Parham*, and *Gonzales*. The record does not support the conclusion that Mulder's representation of both the appellant and Darin Routier created a situation in which Mulder had to forego a strategy in the appellant's trial that he would have otherwise pursued if he had not represented Darin Routier.

We hold that no actual conflict of interest existed regarding Mulder's representation. As a result, we overrule the appellant's first point of error.

III. Eighth, Ninth, and Tenth Points of Error: Dismissal of Sworn Juror

In the appellant's eighth, ninth, and tenth points of error, she claims that the trial judge violated her right to counsel, her right to be present, and Article 36.29 when he had an unrecorded ex parte communication with an unnamed person who provided the only basis for finding that a sworn juror was disabled.

At the beginning of the proceedings on January 16, 1997, just before the State was to present its case-in-chief, the trial court announced that one of the jurors was disabled and unable to continue. The trial court replaced the disabled juror with an alternate. The appellant requested a continuance to determine whether, in fact, the juror was disabled as required by Article 36.29. The juror had attended trial proceedings until that day. The trial court responded that the juror had had the flu the day before, that she struggled to come to the proceedings, and that she had become bedridden. The appellant objected on the basis that it violated Article 36.29(b). The trial court overruled this objection. The appellant made no other objections, and the trial court proceeded with the trial with the alternate juror. The next day, the trial court admitted a photocopy of a note from the disabled juror's physician.

Appendix A

A. Violation of right to counsel and right to be present

The appellant claims that the trial court violated her Sixth Amendment right to counsel and her right to be present during a critical stage of her trial by engaging in an unrecorded ex parte communication about the discharged juror's disability when her lawyer was not present. The appellant objected on the basis that the trial court's decision violated Article 36.29. Because the objection at trial does not comport with her complaint on appeal, these complaints are not preserved for review. Tex. R. App. P. 33.1(a).

The appellant claims that her failure to object on these bases were preserved without objection because the State must show a valid waiver of those constitutional rights. The record contains no evidence of a waiver, and therefore she argues, the complaint was preserved. The State argues that even constitutional claims can be forfeited by the failure to assert them. *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993).

Even if we assume that the appellant did not need to object to preserve these complaints; the appellant still cannot prevail. The appellant has not shown that her rights to due process and counsel were violated.

The appellant relies on *Santiago v. United States*, 977 F.2d 517 (10th Cir.1992), in support of her claim. In that case, during defense counsel's closing argument, a juror became ill and had to be excused. The defendant initially objected to using the only alternate juror because during voir dire Santiago said that she had heard another prospective

juror comment that the entrapment defense was ridiculous. The trial court conducted an ex parte examination of the alternate juror on the record. Once satisfied that the juror could render an unbiased verdict, the trial court allowed the parties to view the transcript of the examination. The defendant made no further objections. As a result, the Tenth Circuit reviewed the case for plain error. *Id.* at 521-22. The Court conducted a detailed analysis addressing the appellant's right to be present and concluded that a defendant's due process right to be present did not extend to situations that did not involve the confrontation of witnesses or evidence related to her ability to defend against the charge. *Id.* at 522.

The Tenth Circuit relied on *United States v. Gagnon*, 470 U.S. 522, 526 (1985), in which the Supreme Court said that "[t]he defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Id.* at 526. This is because the right to be present is largely derived from the defendant's right to confront witnesses against her. *Ibid.* Although the Court was directly addressing whether the defendant had a due process or confrontation right to be present, the analysis applies with equal persuasion regarding the appellant's right to have her counsel present.

The Supreme Court explained that it has recognized that the right to be present does extend to some situations in which the defendant "is not actually confronting witnesses or evidence against him." *Ibid.* As we explained above, in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Supreme Court outlined the parameters of a defendant's due process

right to be present during trial. The Court said "whenever [the defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" the defendant has a right to be present. The "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 105-106, 108.

The appellant claims that she had a right to be present and have her counsel present at all critical stages of her trial. This is true, but the circumstances about which the appellant complains did not constitute a critical stage. The trial court's learning that the juror was ill and could not continue was not a critical stage in the trial. The appellant was present when the trial court dismissed the juror, and she was able to make objections at that time. We cannot say that the absence of the appellant and her counsel when the trial court received information about the juror's illness thwarted the appellant's right to a fair and just determination of her guilt and punishment in this case. We overrule the appellant's eighth and ninth points of error.

B. Violation of Article 36.29

In her tenth point of error, the appellant claims that the trial court violated Article 36.29 in replacing the disabled juror when there was no evidence in the record to show that the juror was disabled. The State claims that the trial court did not abuse its discretion.

Appendix A

Article 36.29 provides:

> If alternate jurors have been selected in a capital case in which the state seeks the death penalty and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.26 of this code shall replace the dead or disabled juror. Likewise, if another juror dies or becomes disabled from sitting before the charge of the court is read to the jury, the other alternate juror shall replace the second juror to die or become disabled.

The determination as to whether a juror is disabled is within the discretion of the trial court, and absent an abuse of that discretion, no reversible error will be found. *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999). We have said that a disability for purposes of Article 36.29 includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000).

In this case, the trial court received information that the juror was bedridden with the flu. The following day, a letter from the juror's doctor was admitted, without objection, indicating that the juror was ill. Without more we cannot say that the trial court abused its discretion in replacing the disabled juror with an alternate. We overrule the appellant's tenth point of error.

IV. Sixth and Seventh Points of Error: Evidentiary Question

In the appellant's sixth and seventh points of error, she complains that the trial court abused its discretion under Texas Rule of Evidence 614[30] and violated the appellant's right to federal due process when it excluded testimony from the appellant's private investigator about a prior inconsistent statement made by the State's blood spatter expert.[31] The appellant argues that the evidence was strong and absolutely crucial to her defense. The State argues that the record shows that the trial court did not abuse its discretion because the appellant's attorneys knew the investigator was in the courtroom and knew his status as a potential impeachment witness. In addition, the State argues that the impeachment testimony would have been of minimal value.

Before testimony began in the trial, the State requested that the trial court invoke Rule of Evidence 614 to keep witnesses out of the courtroom while not testifying. The appellant's investigator was present in the courtroom throughout the appellant's trial, and he was not excused from the rule. The State's blood spatter expert, Tom Bevel, testified that he found four cast-off or spatter bloodstains on the

30. At the time of the appellant's trial it was Texas Rule of Criminal Evidence 613.

31. Within the appellant's analysis of points of error six and seven she argues that the excluded testimony should have been admitted under the rule of optional completeness. The appellant did not object on this basis at trial, and thus, has failed to preserve error. Tex. R. App. P. 33.1.

nightshirt the appellant had been wearing on the night of the murder. All of the stains contained some of the appellant's blood and some of the blood of either Damon or Devon.

Bevel testified that the stains could be either (1) two separate stains with the appellant's blood overlaying the child's blood or (2) a mixture of both the appellant's blood and the child's blood. Bevel said that if the stains were a mixture, it would show that the appellant had been cut before the stain was deposited, which is inconsistent the State's theory that the appellant stabbed the children first before inflicting her own wounds. If the stains were overlaid, it would be consistent with the State's theory of the case. Bevel testified that at least one of the stains appeared to be mixed, not overlaid. He testified that the other three could have been overlaid stains.

Defense counsel cross-examined Bevel about statements made to three of the appellant's attorneys and the appellant's investigator, Lloyd Harrell. Specifically, defense counsel asked Bevel whether he had said that the four stains were mixed rather than overlaid. Bevel responded:

Bevel: I told you there was some mixed blood. I don't know if we specifically addressed that stain. I don't recall.

Defense: Well, you told us that in your judgment, that that was mixed blood in one stain?

Bevel: I don't recall specifically stating that it was one stain. Now, which one are we referring to here?

Defense: I'm talking about these, I'm talking to all four of them on the front of the shirt, all four of them mixed?

Bevel: The only one that I can say is really consistent without any hesitation, is the one that is up in this area here, which is going to be LS-1.

Defense: You are talking about the highest one on the left shoulder?

Bevel: That is correct.

Defense: Okay. But you didn't tell us when we were up there that you thought all of those others were a stain that was mixed before it hit the shirt?

Bevel: I don't believe so.

The trial court prohibited Harrell's testifying before the jury also. The trial court said, "All right. Same ruling.[32] So let's get on with making your Bill, whatever you want to do."[33]

---

32. This is a reference to the trial court's ruling on another proposed witness. The trial court had said in reference to that witness, "Well, do a Bill then, because I'm not going to let—anybody who has been in the courtroom is not going to testify. That is my discretion, and so I'm going to exercise my discretion and not let her testify."

33. As we discuss below, Rule 614 is not a per se exclusionary rule. Trial courts should perform the balancing test set out in *Webb v. State*, 766 S.W.2d 236, 244 (Tex. Crim. App. 1989).

Outside the presence of the jury, Harrell testified that he and three of the appellant's attorneys traveled to Oklahoma City to interview Bevel. In Harrell's opinion, the statements that Bevel made in Oklahoma City were "materially different" from his testimony at trial. Harrell testified that, during the interview, Bevel had said that all four of the stains were mixtures. Harrell said he was certain of this because he asked Bevel at least twice, "does this mean that each of those blood stains, the knife had to contain the blood of Darlie and the blood of one of her children?" Bevel had responded, "yes," according to Harrell.

On cross-examination, the State asked Harrell if he had recorded the approximately four-hour meeting with Bevel. Harrell said that he had not and that he had not asked Bevel if he would allow the defense team to record the conversation.

(A) Rule of Evidence 614

Rule of Evidence 614 contains what has been commonly referred to as "the Rule." When a party invokes the Rule, or it is invoked on the court's own motion, the trial court orders witnesses to remain outside the courtroom.[34] There

---

34. The text of Rule 614 reads:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:
>
> > (1) a party who is a natural person or in civil cases the spouse of such natural person;
>
> (Cont'd)

are exceptions to the Rule: the parties, people who are shown to be essential to a party's case, and generally the victim of the offense. Tex.R. Evid. 614. The Rule is designed to prevent witnesses from altering their testimony, consciously or not, based on other witnesses' testimony. *Webb v. State*, 766 S.W.2d 236, 239 (Tex. Crim. App. 1989).

There are basically two situations that arise under Rule 614. One is when a party complains of the admission of evidence in violation of the Rule. In those cases, we look at whether the complaining party objected and was harmed. *Id.* at 240. The other situation that can arise under Rule 614 is when a witness is excluded. *Ibid.* In cases arising from the exclusion of a defense witness, the trial court must consider the competing interest of the defendant's right to defend himself. *Id.* at 240. Rule 614 contains no provision for sanctions for a violation. In *Webb v. State*, we explained that when a trial court decides whether to disqualify a witness

---

(Cont'd)

> (2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;
>
> (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or
>
> (4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

under the Rule, the trial court must balance the interests of the State and the accused, consider alternative sanctions, and consider the benefit and detriment arising from a disqualification in light of the nature and weight of the testimony to be offered. *Id.* at 244.

In *Webb*, we formally adopted a test to apply when a witness was prohibited by the trial court from testifying because the witness was present in the courtroom during the trial. The appellate court determines:

> (1) if the rule was violated and the witness disqualified, were there particular circumstances, other than the mere fact of the violation, which would tend to show the defendant or his counsel consented, procured or otherwise had knowledge of the witness's presence in the courtroom, together with knowledge of the content of that witness's testimony; and (2) if no particular circumstances existed to justify disqualification, was the excluded testimony crucial to the defense.

Id. at 245.

The second part of the analysis is dispositive of the appellant's case. The testimony Harrell provided cannot be said to be crucial to the appellant's defense. In *Webb* we said that for a defendant to prevail, he must show that the evidence "was 'extraordinary' in the sense that it was crucial to his defense." *Webb*, 766 S.W.2d at 245. In that case, we held that the excluded witness's testimony was crucial for several reasons. *Id.* at 245-46. We noted that the witness's testimony

was probative of an accomplice witness's credibility and the defense's theory of the case. She also provided evidence of other witnesses' motives for testifying as they did. The excluded witness was the only witness who could corroborate the defendant's claim that another person had been involved in the offense.

In *Davis v. State*, 872 S.W.2d 743 (Tex. Crim. App. 1994), we said that "simply because the excluded testimony is not the only evidence supporting a defensive theory does not mean that it is not crucial to such defensive theory." *Id.* at 746. We held that the testimony of an excluded witness was crucial because it corroborated other evidence favorable to the defense that the jury would have been more inclined to believe had the excluded testimony been admitted. *Ibid.*

This case is distinguishable from those cases. First, Harrell's testimony would not have been admissible as substantive evidence that the stains Bevel testified about were mixed as opposed to overlaid. Harrell's testimony was admissible for impeachment purposes only, unless the statement came within an exception to the general prohibition of hearsay. Tex.R. Evid. 801 & 802; *see* 1 Steven Goode, Olin Guy Wellborn III, M. Michael Sharlot, Texas Practice Guide to the Rules of Evidence § 613.2, at 796-97 (3d ed.2002). We see no exception to the hearsay rule that would allow the jury to consider Harrell's testimony as substantive evidence of the appellant's innocence. If he had been allowed to testify, the State would have been entitled to a limiting instruction on that basis.

It is possible that either Bevel misunderstood Harrell's questions or that Harrell misunderstood Bevel's answer. As commentators have explained, "The fact of inconsistency does not by itself reveal whether the witness is lying or is simply mistaken. Nor does it indicate which (if either) of the statements— the trial testimony or the previous inconsistency —is the correct one." 1 Steven Goode, Olin Guy Wellborn III, M. Michael Sharlot, Texas Practice Guide to the Rules of Evidence § 613.2, at 796 (3d ed.2002). The record does not reveal, and the appellant does not suggest, that Bevel had a motive to present different information at trial.

Next, Bevel's testimony was, at worst, neutral. He said that, in his opinion, one of the stains was mixed. This tended to support the appellant's theory of the case. He said that he could not be certain about the other three stains. This testimony was not highly probative of the question of the appellant's guilt. We cannot say that the trial court abused its discretion under Rule 614 in excluding Harrell as a witness.

(B) Due Process

Next, we address whether the trial court violated the appellant's federal due process right to call witnesses for her defense. The appellant's due process argument consists of stating that, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). She goes on to say that a defendant's due process right to present her defense must be balanced against the State's interest in enforcing the rule. The appellant cited *Holder v. United*

States, 150 U.S. 91, 92 (1893), *Davis*, 872 S.W.2d at 745, *Webb*, 766 S.W.2d at 244, and *Braswell v. Wainwright*, 463 F.2d 1148, 1152 (5th Cir.1972). No other authority or argument for the appellant's claim is presented.

In *Holder v. United States*, the Supreme Court addressed a situation in which a witness, who had been in the courtroom, testified when no objection was made on the basis of the Rule until after he testified. The Supreme Court said that trial courts may not prevent a witness from testifying solely on the basis that they violated the Rule. *Holder*, 150 U.S. at 92. In this case, the trial court did not give a reason beyond the violation of the Rule for excluding the testimony. But the trial court could have found, as we have concluded, that Harrell's testimony was not crucial to the defense. The other cases cited by the appellant in support of her case are distinguishable on that basis. We overrule the appellant's sixth and seventh points of error.

Having found no reversible error, we affirm the trial court's judgment and sentence.

APPENDIX B — ORDER OF THE TEXAS COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS DATED SEPTEMBER 10, 2003

TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

THE STATE OF TEXAS,

TO THE CRIMINAL DISTRICT COURT NUMBER THREE OF DALLAS COUNTY — GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on the **21st** day of **MAY**, A.D. 2003, the cause upon appeals to revise or reverse your Judgment between:

DARLIE LYNN ROUTIER

VS.

THE STATE OF TEXAS

CCRA NO. 72,795

TRIAL COURT NO. F-9639973-J.

was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance

with the Opinion of this Court, and that this Decision be certified below for observance."

Appellant's Motion for Rehearing is DENIED.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, **THE HONORABLE SHARON KELLER**
Presiding Judge of our said
COURT OF CRIMINAL APPEALS,
with the Seal thereof annexed, at the City of Austin,
this **10th** day of **SEPTEMBER**, A.D. 2003.
TROY C. BENNETT, JR., Clerk
s/ Veronica Arellano, Deputy Clerk
Veronica Arellano

APPENDIX C — ORDER OF THE COURT OF CRIMINAL APPEALS ISSUED OCTOBER 14, 1998

NO. 72,795

DARLIE LYNN ROUTIER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from DALLAS County

ORDER

On this the 14th day of October, 1998, came on to be considered the appellant's second motion to supplement the reporter's record and the appellant's "Motion to Correct/ Clarify Reporter's Record". The motions relate to the reporter's record in the above styled and numbered cause now before this Court on direct appeal from appellant's capital murder conviction in Cause No. F96-39973-J in Criminal District Court No. 3 of Dallas County.

Upon due consideration, appellant's motions are granted. The court reporter is directed to prepare, certify and file in this Court within 30 days a supplemental reporter's record containing any omitted items. Additionally, in response to appellant's "Motion to Correct/Clarify Reporter's Record",

the dispute is submitted to the trial court for resolution. The trial court must ensure that the reporter's record is made to conform to what occurred at trial.

The actions required by this order shall be completed within 30 days of the date of this order.

IT IS SO ORDERED THIS THE 14TH DAY OF OCTOBER, 1998.

PER CURIAM

APPENDIX D — DEFENDANT'S MOTION TO HAVE HER ATTORNEY QUESTION SUZAN SIMMONS AND BILL OF EXCEPTION ABOUT THE QUESTIONS THAT HE WANTS TO ASK HER FILED APRIL 1, 1999

No. F96-39973-MJ
DALLAS COUNTY CRIMINAL
DISTRICT COURT NO. 3

No. 72,795
TEXAS COURT OF CRIMINAL APPEALS

THE STATE OF TEXAS

vs.

DARLIE ROUTIER,

Defendant-Appellant

DEFENDANT'S MOTION TO HAVE HER ATTORNEY QUESTION SUZAN SIMMONS AND BILL OF EXCEPTION ABOUT THE QUESTIONS THAT HE WANTS TO ASK HER

COMES NOW, the defendant, Darlier Routier, by and through her attorneys of record, and moves this Honorable Court to allow her attorney to question Suzan Simmons under oath at the April 2 hearing on her objections to the reporter's record. In support of this motion, the defendant will show:

The court informed counsel at an unrecorded in chambers conference that it was inclined not to allow the attorneys for

either side to question Suzan Simmons at the April 1 hearing on her objections to the reporter's record. The court stated that it would only permit the attorneys to propose questions for the court to ask her.

This unprecedented procedure would violate the defendant's sixth amendment right to counsel, the confrontation clause and the due process clause. In *Chessman v. Teets*, 354 U.S. 156 (1957), the Supreme Court held that these constitutional provisions guarantee that counsel must be permitted to actively participate in an adversarial hearing on the accuracy of the record in a criminal trial. At any hearing in a capital case when a judge determines the facts, counsel must have "an opportunity to be allowed to substantiate a claim before it is rejected" by presenting evidence and cross-examining witnesses. *Ford v. Wainwright*, 477 U.S. 399, 412-13 (1986). Tex.Evid.R. 611 only gives the court discretion to exercise reasonable control over counsel's interrogation of witnesses and discretion to participate in the questioning, *Metzger v. Sebek*, 892 S.W.2d 20 (Tex.App. Hous. - 1st Dist. 1994). Rule 611 does not permit the judge to complete perclude counsel from asking any questions about relevant, material facts. *Prezelski v. Christinansen*, 775 S.W.2d (Tex.App. 4th Dist, 1989).

If the court refuses to allow counsel to question Simmons at all, it should treat the following questions as a bill of exception and offer of proof.

1. What raw materials did you use to prepare the hard copy of the record that you produced?

Appendix D

2. Please explain exactly how you used each of these materials to prepare your record?

3. The record shows that you were given a paper copy of Halsey's steno notes, an edit disk of her steno notes that translated the symbols into English, audio tapes of both phrases of the trial and pretrial hearings and a hard copy of the record that Halsey prepared. Do you recall receiving a written order from Judge Francis to compare each of these materials with the others? If not, refresh her recollection with a copy of the order.

4. Did Judge Francis change the instructions that he gave you in that order in any way? If so, please explain what changes were made and what you and Judge Francis said to each other about them.

5. Did you compare every line of the steno notes on the edit disks with every line of the hard copy of Halsey's record and the audio tapes? If so, did you make a record of each discrepancy that you found between these materials?

6. If you did not compare the edit disks or paper copy of the steno notes with the hard copy of Halsey's record and audio tapes, please explain why?

7. Do you have personal knowledge of whether Halsey's steno notes and/or the hard copy of Hasey's record contain a complete and accurate transcription of what happened at the trial?

8. Do you have personal knowledge of whether the audio tapes are a complete, accurate, unedited recording of the trial?

9. Did you have the ability to identify every speaker on the audio tapes by relying on your personal knowledge?

10. Can you certify that based on your personal knowledge, the record that you prepared "is a true and correct transcription of all portions of evidence and other proceedings."

11. If any or all of the materials that you used to prepare your record are not a complete and accurate account of the proceedings, isn't is a fact that your record could suffer from the same flaw as the materials?

12. Assume that the court reporter's stenographic notes are the official record of the trial in Texas, can you certify that your record agrees with those notes since you did not compare them? If so, explain why.

13. If the court reporter's stenographic notes used the official record of the trial, could you determine whether the hard copy of Halsey's record was an accurate transcription of the official one without comparing the hard copy to the notes?

14. If Texas law forbids a court from using uncertified audio tapes of a trial to determine the accuracy of the hard copy of the reporter's record, can a court determine the accuracy of your hard copy?

Appendix D

15. Isn't it a fact that your record is only as good as the materials that you used to prepare it because you have no personal knowledge of what happened at the trial?

16. Isn't it true that you cannot certify that your record is a complete record of the trial regardless of which materials you used to prepare it because you do not know whether Halsey failed to make a stenographic or electronic record of part of it?

17. Do you believe that an independent court reporter must review Halsey's record of the voir dire before it is certified?

18. Isn't it true that Halsey's record is the worst one that you have ever seen?

If the court asks Simmons these questions, the defendant reserves the right to make an additional bill about follow up questions that he would have asked.

WHEREFORE, for the reasons stated above, the court should allow counsel to question Simmons or alternatively accept his offer of proof and bill of exceptions about the questions that he would have asked her.

Respectfully submitted,

s/ J. Stephen Cooper
J. Stephen Cooper
3524 Fairmont St.
Dallas, Tx. 75219
214-522-0670
SBN 04890100

Appendix D

s/ Steven Losch
Steven Losch
906 Delia Drive
Longview, Tx. 75601
903-234-1373
SBN 00789805

APPENDIX E — ORDER OF THE COURT OF CRIMINAL APPEALS, AUSTIN TEXAS DATED APRIL 26, 1999

IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

CAUSE NO. 72,795

DARLIE LYNN ROUTIER

VS.

STATE OF TEXAS

ORDER

On this 26th day of April, 1999, came on to be considered the motion of the appellant's *counsel* to correct/clarify the reporter's record in the above styled and numbered cause now before this Court on direct appeal from appellant's capital murder conviction in Cause No. F-9639973-J in the Criminal District Court No. 3 of Dallas County.

AND SUCH MOTION is hereby granted. The trial court is ordered to conduct an independent review of all portions of appellant's court proceedings to ensure that the entire reporter's record is made to conform to what occurred at trial.

IT IS SO ORDERED.

PER CURIAM

APPENDIX F — DEFENDANT-APPELLANT'S OBJECTIONS TO THE PROPOSED NEW REPORTER'S RECORD FILED MARCH 2, 2000

No. F96-39973-MJ

IN THE CRIMINAL DISTRICT COURT

NO. 3 OF

DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

v.

DARLIE LYNN ROUTIER

DEFENDANT-APPELLANT'S OBJECTIONS TO THE PROPOSED NEW REPORTER'S RECORD

COMES NOW, the defendant/appellant, Darlie Lynn Routier (hereafter referred to as the defendant), by and through her attorneys of record, and objects that the proposed corrected reporter's record for her direct appeal in the above numbered and entitled cause violates her rights under the Texas Rules of Appellate Procedure, U.S.CONST.amend. XIV, and TEX.CONST.art. I, §19 because it is incomplete and inaccurate and the procedure for creating it was fundamentally unfair. In support of this objection, the defendant will show:

Appendix F

1.

A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED BECAUSE THE RECORD OF A HEARING THAT WAS CONDUCTED TO DETERMINE WHETHER TRIAL COUNSEL DOUGLAS MULDER HAD A CONFLICT OF INTEREST IS MISSING.

STATEMENT OF FACTS

On September 19, 1996, the State filed a motion to remove the defendant's court appointed lawyers from the case alleging Douglas Mulder was retained to represent her. CR 474.[1] Exhibit A. Mulder appeared in court that day to represent the defendant's husband, Darin Routier, and her mother, Darlie Kee, at a hearing to show cause why they should not be held in contempt for violating a gag order. RR.8: 6-7.[2] Mulder actively represented Darin Routier and Kee at the show cause hearing. RR.8: 9-11. The trial court accepted his argument that Darin did not violate the gag order. RR.8: 12-13.

---

1. The clerk's record is cited as CR.

2. The proceedings conducted on September 9, 1996, appear in Volume 8 of the redlined copy of the record that Simmons prepared to reflect any differences between her record and the Halsey record. Both versions of this part of the record are virtually identical. All references to the reporter's record (RR.) herein will be to this red-lined copy of the record.

Appendix F

When the show cause hearing was completed, the trial court asked Darin Routier whether he had retained Mulder to represent the defendant. RR.8: 16. Darin denied this. RR.8: 16-17. The trial court then asked Darin whether he knew of any arrangements to have Mulder represent her. RR.8: 16. Darin responded that he did not, but Mulder informed the court that Kee retained him "to assist" the defendant's court appointed lawyers. RR.8: 16-17. The trial court ruled that Mulder could act as a consultant to appointed counsel and remain in the courtroom during the trial, but he could not file motions or participate in the litigation of the case unless he filed a motion to substitute retained counsel for appointed counsel. RR.8: 18-19.

On October 21, 1996, Mulder filed a written motion to substitute counsel and made his first appearance in court as the defendant's lawyer. CR 52. The docket sheet for October 21, 1996, states that Mulder's motion to substitute himself as the defendant's counsel was granted after testimony and evidence was received at a hearing. CR 6. The official court reporter, Sandra Halsey, made a stenographic record of the proceedings that were conducted in the morning on that date, but she did not turn over an audio tape of that part of the trial. The new court reporter, Susan Simmons, transcribed Halsey's stenographic notes of those proceedings, but Simmons would not certify that part of the reporter's record without a tape.

According to the transcript of Halsey's stenographic record of the proceedings on the morning of October 21, 1996, the trial court asked Mulder whether his "arrangement

as a consultant" with Kee was terminated. RR.10: 10.[3] Mulder responded that it was expanded and the defendant confirmed that she wanted Mulder to represent her. RR.10: 10. The trial court then, without placing her under oath, asked:

> THE COURT: If there is any potential conflict with Mr. Mulder representing you *and being a consultant to Ms. Kee*, do you waive any potential conflict that might exist? (Emphasis added.)
>
> THE DEFENDANT: I'm not sure if I understand.
>
> MR. DOUGLAS MULDER: He wants to know if you give up any claim to a conflict *in so far as I represent your mother*. (Emphasis added.)
>
> THE DEFENDANT: No, there is no conflict.
>
> THE COURT: So you waive any conflict that might exist, is that correct?
>
> THE DEFENDANT: Yes, sir.

RR.10: 10-11.

---

3. The pertinent part of the transcription of Halsey's stenographic record of the proceedings in the morning on October 21, 1996, appears in Volume 10 at pages 8-10 of the redlined copy of the record that Simmons produced. There are no material differences between Halsey's stenographic notes and the hard copy of the Halsey record of those pages.

Appendix F

The trial court granted Mulder's motion to substitute as the defendant's lead counsel after this colloquy was completed. RR.10: 11. Mulder's representation of Darin Routier was not mentioned at all.

On November 12, 1996, the State filed a motion that was styled NOTICE OF POSSIBLE CONFLICT OF INTEREST. CR 55. (Exhibit B). The State's motion asserted that Mulder had a potential conflict because Darin had the opportunity to kill the children and "recent analysis of physical evidence suggests that Darin Routier may have participated with the defendant in the crime or coverup of the crime." CR 56. The State's motion asked the trial court to conduct a hearing to determine whether Mulder had a conflict of interest because of his prior representation of Darin Routier and, if so, whether the defendant and Darin Routier would waive it. CR 56.

On the day that the State's NOTICE OF POSSIBLE CONFLICT OF INTEREST was filed, the trial court conducted a colloquy with the defendant and the prosecutors that Halsey audio taped and stenographically recorded. Simmons has testified that the audio tape of this part of the proceeding reflected the following:

> THE COURT: All right. Let's put this on the record. I have in my possession notice of motion, notice of possible conflict of interest, by Gregory Davis, an Assistant District Attorney from Dallas, asking me to ascertain whether or not Mr. Mulder has any conflict of interest in this case.

Appendix F

THE COURT: And, I believe that the record will reflect that I have already asked these same questions of Mr. Mulder when we first started and that *Mrs. Routier previously waived any conflict of interest*. Is that not so, Miss Routier?

THE DEFENDANT: Yes, yes sir.

THE COURT: And I believe that your husband *Darin Routier also knowingly and intentionally waived any conflict of interest*.

THE DEFENDANT: Yes, he did.

THE COURT: *I think that was all in the record*. Was it not?

THE DEFENDANT: It was asked to us at the beginning when we changed.

THE COURT: That is my recollection of things.

THE DEFENDANT: Yes, sir.

THE COURT: We did that the first day here, didn't we?

MR. TOBY L. SHOOK: I think so.

THE DEFENDANT: We did it that day, but you had asked me when I was changing attorneys.

THE COURT: Yes, ma'am. But I mean in Kerrville. We did it right then and there.

THE DEFENDANT: Yes.

THE COURT: As I recall it, it was the first day before the jury, change of venue and all that, before we got into the jury selection.

MS. SHERRI WALLACE: Judge, I think this is new evidence and Greg just wanted to make real sure. There is some new evidence.

THE COURT: Well, I will tell you what will do. We will have the hearing when this jury's picked. *We will have a hearing all over and I will ask Miss Routier again* and I will ask Mr. Routier again. I'm sure we will see what the questions are.

THE DEFENDANT: I know you have to got through that procedure but the questions will be—

THE COURT: Well, I feel I will not be surprised at the same answers. Thank you. But we will do it after we get this jury picked.

THE DEFENDANT: Yes, sir.

THE COURT: All right.

RR.22: 2671-73. (Emphasis added.)

Appendix F

On Nov. 18, 1996, the trial court again briefly addressed the State's motion to determine whether Mulder had a conflict of interest without ruling on it. This colloquy was also tape recorded and stenographically recorded by Halsey. According to Simmons, the following statements were made about the State's motion during the colloquy:

> THE COURT: Now, I have several motions. I have a motion filed last week considering any conflict of interest that Mr. Mulder might have.
>
> THE COURT: The Routiers, *I think we have already waived that. We have got him on the record*, was it not Ms. Halsey.
>
> THE COURT REPORTER: *Yes sir.*
>
> THE COURT: On the 21st, as I recall, I put Ms. Kee under oath, Mr. Routier under oath, Mrs. Darlie Routier under oath for this purpose only. And they both waived any conflicts that may exist.
>
> THE COURT: Has anything new happened since then?
>
> MR. RICHARD MOSTY: Our response that Darlie Routier signed last week further reconfirms that.
>
> THE COURT: That's right. She reconfirmed it last week. Now, we can have a brief hearing when we start this on the 6th if everybody wants to, but I'm quite sure the answers will be the same.

RR.26: 3323-24. (Emphasis added.)

Appendix F

The trial court did not mention the State's motion or Mulder's conflict again in the Halsey or Simmons records. The signed response that Mosty referred to is not in the clerk's record.

ARGUMENT AND AUTHORITIES

The hearing about the conflict of interest that resulted from Doug Mulder's representation of the defendant's husband that the trial court discussed with the attorneys and the defendant on November 12 and 18, 1996, does not appear in the Simmons record, the hard copy of the Halsey record, Halsey's stenographic notes or her audio tapes. The record of that hearing is essential to the appeal because the defendant needs it to show that she did not make a knowing and intelligent waiver of the conflict.

The Simmons and Halsey records of the proceedings on November 12th and November 18th prove that there was a hearing about the conflict that resulted from Mulder representation of Darin Routier before the State filed a motion to reconsider the issue on November 12th. Halsey's statement to Judge Tolle that she made a record of the defendant and her husband waiving that conflict under oath is authoritative because it was her duty to state for the record whether she made a record of a particular proceeding if that question arose. *Jones v. State*, 923 S.W.2d 158, 159-60 (Tex.App. - Beaumont 1996), *rev'd on other grounds*, 942 S.W.2d 1 (Tex.Crim.App. 1997) (reporter's parenthetical note in record that she did not transcribe part of court's comments to venire was sufficient to prove that comments were not transcribed). Judge Tolle's recollection of the missing hearing during his

colloquy with Halsey confirms that her statement about it was correct. *Moody v. State*, 827 S.W.2d 875, 879 (Tex.Crim.App. 1993) (accepting recollection of trial judge and deputy clerk that there was an unrecorded sua sponte excusal of a juror). The uncontradicted statements of the attorneys for both sides about the missing hearing are also authoritative because they each had the power to supplement the record by describing events that were not transcribed by the official reporter. *Hill v. State*, 3 S.W.3d 249 (Tex.App.-Waco 1999, pet. filed). Appellate courts have accepted the unsworn undisputed statements of a single prosecutor or defense attorney about unrecorded court proceedings as true in several cases. *See, e.g., Rey v. State*, 897 S.W.2d 333, 336 (Tex.Crim.App. 1995) (accepting defense counsel's repeated statements that there was an unrecorded adverse ruling on motion); *Quevedo v. State*, 661 S.W.2d 321 (Tex.App. - Corpus Christi 1983, pet. ref'd) (accepting prosecutor's statement that defense counsel requested instruction about lesser included offense at unrecorded in chambers charge conference); *Hicks v. State*, 525 S.W.2d 177, 178 (Tex.Crim.App. 1975) (accepting defense attorney's description of prosecutor pointing at defendant during summation). The evidence of the missing hearing about Mulder's conflict is overwhelming in comparison to the evidence that was accepted in those cases because *every* concerned participant in the trial stated that it occurred and the judge confirmed it twice.

It is inconceivable that the trial judge, five defense attorneys, three prosecutors, the defendant and the court reporter confused the hearing about the trivial conflict arising from Mulder's representation of the defendant's mother in

the uncertified record of the proceedings on the morning of October 21, 1996, with the hearing about the serious conflict arising from his representation of her husband that the State addressed in its motion. The judge and prosecutors must have known that there would be an automatic reversible error if no hearing was conducted on the State's motion even if the defendant did not object or show some harm. *United States v. Kliti*, 156 F.3d 150 (2nd Cir. 1998); *United States v. Fish*, 34 F.3d 488, 992 (7th Cir. 1994); *United States v. Levy*, 25 F.3d 146, 154 (2d Cir. 1994). The defendant's acknowledgment on November 12th that she waived that conflict at a prior proceeding could not establish that it was a knowing and voluntary waiver because the record does not show that she was admonished about the nature of the conflict. *Jordan v. State*, 571 S.W.2d 883, 884 (Tex.Crim.App. 1978). The defendant's waiver of the conflict that resulted from Mulder's representation of her mother certainly could not waive the separate conflict that resulted from his representation of her husband. *United States v Abner*, 825 F.2d 835, 843 (5th Cir. 1987).

The fact that the judge and prosecutors did not conduct a hearing about the conflict arising from Mulder's representation of Darin Routier after the State alleged that there was new evidence that required it is also very strong evidence that there was a hearing about that conflict before the State's motion was filed. It is possible that the judge and prosecutors believed that a waiver of the conflict did not have to be repeated to avoid reversible error, but it would defy common sense to suggest that they forgot to conduct a hearing on the State's motion if there was no recorded waiver before it was filed.

Appendix F

This Court does not have to determine when the hearing was conducted, why it does not appear in Halsey's stenographic notes or whether Halsey audio taped it.[4] The only material facts are that the hearing occurred and Halsey made a record of it that cannot be found.

---

4. There is a plausible explanation for the fact that no stenographic or electronic recording of the hearing exists. Judge Tolle could have conducted a very brief colloquy with the defendant and Darin Routier during the lunch break on October 21, 1996, because he realized that the defendant had only waived conflict that resulted from Mulder's representation of her mother at the morning session. Halsey may have decided to make an audio tape of the proceeding with the intent of stenographically transcribing it later on because she did not want to interrupt her lunch to type a record. Halsey's tape recorder may not have been working because Halsey told a bailiff on the audio tape of the afternoon session that she needed some batteries.

Appendix F

2.

A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED BECAUSE THE RECORD OF THE PROCEEDINGS ON THE MORNING OF OCTOBER 21, 1996, THAT SIMMONS CANNOT CERTIFY IS ESSENTIAL TO PROVE THAT NO HEARING WAS CONDUCTED TO DETERMINE WHETHER THE DEFENDANT WAIVED THE CONFLICT OF INTEREST THAT RESULTED FROM MULDER'S REPRESENTATION OF HER HUSBAND.

If the Court is not convinced that there was a hearing about the conflict which resulted from Mulder's representation of the defendant and her husband that does not appear in the Simmons record or Halsey's stenographic notes, a significant part of the record necessary to the appeal was still lost or destroyed because there is no certifiable record of the proceedings on the morning of October 21, 1996. The Simmons record presently shows that the judge, the official court reporter, the prosecutors, the defense attorneys and the defendant agreed that the defendant waived the conflict that arose from Mulder's representation of her husband on the morning of October 21. The defendant needs a record of those proceedings to prove that she did not waive the conflict or the waiver was not valid because she was not adequately admonished about it.

Appendix F

The uncertified transcript of Halsey's stenographic notes of the proceedings on the morning of October 21st cannot be used to fill in the gap in the Simmons record because the entire record must be certified. TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q); *Ex parte Smith*, 561 S.W.2d 842 (Tex.Crim.App. 1978). The clerk of the Court of Criminal Appeals will have to return the uncertified part of the record to Simmons and order that defect corrected. *See* TEX.R.APP.P. 37.2. Halsey cannot perform that task because she lost her court reporter's license and Simmons has testified that she will not do it.

The hard copy of the Halsey record of the proceedings on the morning of October 21, 1996, cannot be used because the certificate on her record is void on its face. Halsey's certificate states that the record "contains a full, true, complete and accurate transcript of the proceedings held in this matter *to the best of [her] knowledge*." (Emphasis added.) The certificate should unequivocally assert that the reporter's record is "a true and correct transcription of all portions of evidence and other proceedings." *See* TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q).

The hard copy of the record of the proceedings on the morning of October 21, 1996, that Halsey certified cannot be used to prosecute an appeal even if the defect in the wording of her certificate is not fatal, because her certificate was factually false. A certified reporter's record is presumed to be a complete and accurate transcript of the trial, but that

presumption can be overcome with evidence. *Melendez v. State*, 936 S.W.2d 287, 290 (Tex.Crim.App. 1996); *McGee v. State*, 774 S.W.2d 246 (Tex.Crim.App. 1989); *Smith v. Morris*, 70 S.W.2d 994, 995 (Tex. 1934); *Spencer v. State*, 30 S.W. 46 (Tex.Crim.App. 1895). The truthfulness of the certificate is a question of fact for the trial court to decide. *McGee v. State*, *supra*, at 247; *Johnson v. State*, 924 S.W.2d 750, 751 (Tex.App. - Houston [1st Dist.] 1996, no pet). An appellate court cannot accept the record if the reporter's certificate was false and the defect cannot be corrected. *Ex parte Smith*, 561 S.W.2d 842 (Tex.Crim.App. 1978).

There is overwhelming evidence that Halsey knowingly signed a false certificate. This Court adopted Simmons' opinion that the hard copy of Halsey's record of the proceedings on the morning of October 21, 1996, is not accurate and should not be certified. Halsey admitted under oath at the hearing to revoke her license that she *knew* when she signed the certificate that her record was *not* full, true, complete and accurate (Exhibit C). She has also confessed that she lied to conceal mistakes in her record that could require a new trial because she believes that the defendant is guilty (Exhibit D). And this Court can take judicial notice of the multiple and repeated lies and misrepresentations, sworn and unsworn, by Sandra Halsey as to her preparation of the original reporter's record in this case. Furthermore, by definition, Halsey engaged in unprofessional conduct in "producing an inaccurate transcript or statement of facts" and "producing an incomplete transcript or statement of facts." Standards and Rules for Certification of Certified Shorthand Reporters, Rule IV, B.2. and 3., by order of the Supreme Court of Texas pursuant to TEX.GOV'T CODE ANN. §52.002.

Appendix F

3.

OTHER SIGNIFICANT PARTS OF THE REPORTER'S RECORD OF THE PROCEEDINGS ON OCTOBER 21, 1996, WHICH ARE NECESSARY TO THE APPEAL WERE LOST OR DESTROYED.

The record of several other legally significant events which occurred on the morning of October 21, 1996, was also lost or destroyed. Simmons cannot certify that part of the record. The certificate on Halsey's record of the proceedings was false and did not conform to TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q).

According to the docket sheet and Halsey's stenographic notes of the October 21st morning session, the trial court: 1) dismissed the defendant's court appointed lawyers and allowed new retained attorneys to parachute into a very complex capital case on the day before jury selection began; 2) administered an oath to the panel of prospective jurors; 3) gave preliminary instructions to the venire pursuant to TEX.CODE CRIM.PROC.ANN.art. 35.17(2); and 4) excused several prospective jurors. CR 6; RR.10: 7-60. An appeal cannot be prosecuted without a certified record of all of those significant events.

Appendix F

4.

THE REPORTER'S RECORD OF HUNDREDS OF ANSWERS TO IMPORTANT VOIR DIRE QUESTIONS WAS LOST BECAUSE HALSEY USED PARENTHETICAL DESCRIPTIONS OF THE JURORS' HEAD NODS AND SHAKES TO INTERPRET THEIR UNINTELLIGIBLE RESPONSES AND SIMMONS CANNOT CERTIFY THAT HALSEY'S STENOGRAPHIC NOTES ABOUT THEIR HEAD MOVEMENTS WERE ACCURATE.

The Simmons record contains hundreds of parenthetical descriptions of non-testimonial answers to voir dire questions that she did not observe and could not verify by listening to the audio tapes (Exhibit E).[5] Simmons included Halsey's parenthetical descriptions of the jurors' head nods and shakes in the new record that she certified, but in doing so she did not intend to vouch for the accuracy of Halsey's interpretations of the jurors' head movements. At the hearing to revoke Halsey's license, Simmons testified, "[m]y task was strictly to go through the record for mistakes. Not format, *not parentheticals*, just mistakes in the actual transcript." (Exhibit F) (Emphasis added.) The defendant disputes the accuracy of *all* of those parentheticals because there is no independent verification of Halsey's interpretations of the jurors' head nods and shakes. Indeed, many of the parentheticals appear in the record immediately after Judge

5. A table which identifies many of the non-testimonial answers to voir dire questions and any changes that Simmons made in Halsey's parentheticals is attached to this motion in Exhibit C.

Tolle admonished a juror to give clear verbal answers because Halsey could not understand their head movements.

This massive defect in the Simmons record illustrates why the official stenographic reporter must certify that her record is "a true and correct transcription of all portions of evidence and other proceedings . . . *reported by me*." TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q). (Emphasis added.) That certificate cannot be signed by a reporter like Simmons who only listened to audio tapes of the trial because court reporters must "frequently report non-testimonial" statements of witnesses and jurors that were not accompanied with audible words. *Hill v. State*, 3 S.W.3d 249 (Tex.App. - Waco 1999, pet. filed).[6] A court reporter who did not personally observe the trial can transcribe the stenographic notes of a deceased or disabled reporter who did attend the proceeding when the accuracy of the official reporter's notes was not challenged. *Williams v. State*, 427 S.W.2d 868 (Tex.Crim.App. 1967). That procedure has never been approved in a case like this one where questions about the competence, impartiality, and honesty of the original reporter were raised and the new reporter made tens of thousands of changes in her record. Furthermore, at the time

6. When the official reporter's record is electronically recorded and certified by an official reporter pursuant to TRAP 34.6, the attorneys know that non-testimonial facts will not be reported unless they exercise their authority to verbally describe them for the record. *See Hill v. State*, 3 S.W.3d at 249 (Tex.App. - Waco 1999, pet. filed). The defendant's attorneys did not have the duty to protect the record in that manner because they requested a stenographic record and saw the official reporter typing when the jurors nodded or shook their heads.

of *Williams*, there were no rules regarding the nature of the certificate to be used by a court reporter. The mandatory certificate applicable to this case is as has been previously described, i.e., the certificate requires a statement that the proceedings were "reported by me (the certifying court reporter)."

The parentheticals in the hard copy of Halsey's record cannot be used as the record of the juror's non-testimonial answers because she was biased against the defendant, the certificate on her record was false and it did not conform to TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q).

Halsey's record casts serious doubt on the accuracy of her parenthetical descriptions of the jurors' head nods and shakes because Judge Tolle repeatedly stated that she could not record them. If Halsey did not understand the jurors words, she had a duty to inform Judge Tolle about the problem. *Bond v. State*, 694 S.W.2d 622, 623 (Tex.App. - Beaumont 1985, pet. ref'd). It was impossible for Judge Tolle and the attorneys to monitor what she was typing. *Broussard v. ABC Home Health Svc.*, 1999 Tex.App. - Houston [14th Dist.] LEXIS 8383; *People v. Oliver*, 241 Cal.Rptr. 804, 811 (1987) ("In the usual course of a reported proceeding the participants routinely forget that there is a human transcriber rather than a tape recorder").

Appendix F

5.

THE DEFENDANT DISPUTES THE ACCURACY OF ALL OF THE PARENTHETICAL DESCRIPTIONS OF NON-TESTIMONIAL FACTS ABOUT HER PRESENCE AND THE PRESENCE OF THE JUDGE, JURY, AND THE ATTORNEYS BECAUSE SIMMONS CANNOT CERTIFY THAT THEY ARE TRUE AND CORRECT.

The Simmons record contains a substantial number of parentheticals about the presence or absence of the defendant, the judge, the jury, and the attorneys to which she cannot certify. Simmons did not intend to vouch for the accuracy of those parentheticals when she signed her certificate because she did not observe the trial and the audio tapes did not record what Halsey purportedly saw.

Halsey's parenthetical observations of non-testimonial facts cannot be used to fill in the gaps in the record because she was biased against the defendant, the certificate on her record was false, and it did not conform to TEX.R.APP.P. Appendix, ORDER DIRECTING THE FORM OF APPELLATE RECORD IN CRIMINAL CASES (b)(1)(q).

Parentheticals about the presence of the trial participants are not legally required when the official reporter who attended the trial filed a properly certified record because there is a presumption that the reporter would have noticed their absence and made a record of it. *Green v. State*, 912 S.W.2d 189, 192 (Tex.Crim.App. 1995). That presumption

of regularity cannot be used here because Halsey testified at the hearing to revoke her license that it was her practice to make an affirmative record of the presence of the participants instead of relying on the presumption to reflect that they were all there (Exhibit G).

6.

EVERY PART OF THE SIMMONS RECORD THAT DOES NOT CONFORM TO THE OFFICIAL STENOGRAPHIC RECORD OF THE TRIAL IS INACCURATE AND CANNOT BE CERTIFIED.

The defendant disputes the accuracy of every word in the Simmons record that disagrees with Halsey's stenographic notes. This objection covers virtually all of the substantive changes in the record that Simmons made and many other areas of Simmons record that agree with the hard copy of the Halsey record.[7]

Halsey's stenographic notes are the official record of the trial. *See* TEX.R.APP.P. 34.6(1). Indeed, in the hearing in this Court on November 13, 1998, Tommy Mullins testified to such. The Simmons record is essentially a transcript of

---

7. The defendant has retained a qualified court reporter to prepare a hard copy print out of Halsey's stenographic notes and will introduce that evidence at a hearing to impeach the Simmons record. She is not asking the Court to file her version of the stenographic record as the official record because an official reporter must certify the record. *Valenzuela v. State*, *supra*, 940 S.W.2d at 664-67.

the audio tapes that Halsey or her lawyer turned over to the district attorney. The tapes cannot be used to create a new record. *Soto v. State*, 671 S.W.2d 43 (Tex.Crim.App. 1984); *Valenzuela v. State*, 940 S.W.2d 664, 666 (Tex.App. - El Paso 1996, no pet). The tapes also cannot be used to make substantive corrections in the stenographic record because they were not certified by the official reporter to be a complete, accurate, unedited recording of the trial that she stenographically transcribed. *Ex parte Occhipenti*, 796 S.W.2d 805 (Tex.App.- Houston [1st Dist.] 1990, no pet.); *In re L.B.*, 936 S.W.2d 335, 337 (Tex.App. - El Paso 1996, no pet.).

Halsey is the only person who could have certified the audio tapes because the certification must be based on personal knowledge. *In re L.B.*, *supra*, 936 S.W.2d at 337; *Goode v. Shoukfeh*, 915 S.W.2d 666 (Tex.App. - Amarillo 1996, writ granted), affirmed, 943 S.W.2d 441 (Tex. 1997). It does not matter whether the audio tapes can be authenticated under TEX.R.EVID. 901, without Halsey's testimony. Rule 901 does not apply here because the tapes were not introduced as evidence and the requirements for *certifying* them are different than the requirements of the rule. *Angleton v. State*, 971 S.W.2d 65 (Tex.Crim.App. 1998) (circumstantial evidence and contents of audio tape can be used to authenticate it under Rule 901 without testimony of someone who has personal knowledge of its authenticity).

There is reason to doubt whether the audio tapes are complete and accurate in spite of the fact that Simmons could not find a flaw in them. Halsey stated to the Ft. Worth Star Telegram that "your notes are what is important" because

"[t]apes can be *altered or blipped over*" (Exhibit H) (Emphasis added.) Since Halsey lied to the Court about the existence of the audio tapes because she feared that they would expose fatal flaws in her record, she certainly would have erased part of a tape to achieve the same nefarious goal. Simmons could not determine whether Halsey erased the tape of a self-contained proceeding that started after the judge or the attorneys decided to go back on the record during a side bar or recess.

Simmons' testimony that her reliance on the audio tapes was consistent with the standards and practices of Texas court reporters is not true. There is no reported case history of Texas court reporters relying on audio tapes to make substantive additions, deletions, or changes in a stenographic record of a trial that they attended. Using audio tapes to verify peculiar or technical terms or to clarify quotations or other similar incidental matters is wholly distinct from creating an entire record based on an audio tape. Halsey testified under oath at the hearing to revoke her license, "I never depend on audio tapes. I mean I've heard too many stories of people depending on audio tapes and then something [will] be wrong with the audio tapes" (Exhibit I). It is unprecedented for a Texas court reporter to use the uncertified audio tapes of an official reporter to make thousands of substantive changes in the official stenographic record. Such a practice is certainly contrary to the standards of the profession in a case like this where the tapes were made by a reporter who had the motive and opportunity to tamper with them.

Appendix F

7.

SIMMONS' IDENTIFICATIONS OF THE VOICES OF PEOPLE WHO DID NOT IDENTIFY THEMSELVES WHEN THEY SPOKE ARE INACCURATE AND CANNOT BE CERTIFIED BY A REPORTER WHO DOES NOT HAVE PERSONAL KNOWLEDGE OF THE IDENTITY OF THE SPEAKERS.

Simmons used Halsey's stenographic notes, voice comparisons, and the content of what a speaker said to identify the speakers who did not state their names on the audio tapes. Her identifications of the speakers cannot be certified as true and correct because they were based on her inexpert opinions rather than personal knowledge. The fact that she disagreed with Halsey's identification of the speakers in hundreds of instances illustrates how difficult it was to accurately report that crucial information.

8.

THE SIMMONS RECORD DESCRIBES EVENTS THAT OCCURRED OFF THE RECORD.

Several parts of the Simmons record clearly describe events that occurred after the judge and the attorneys agreed to go off the record. RR.12: 292; RR.13: 607; RR.24: 2963; 3045; RR.28: 277, 280-2; RR.36: 2595-96, 2773-74; RR.44: 5036. In one instance, Simmons even reported what happened after the judge left the bench.

Appendix F

9.

THE ENTIRE REPORTER'S RECORD IS LOST BECAUSE IT IS IMPOSSIBLE FOR A JUDGE WHO DID NOT ATTEND THE TRIAL TO SETTLE THOUSANDS OF SERIOUS DISPUTES ABOUT ITS ACCURACY AND COMPLETENESS WITHOUT THE ASSISTANCE OF THE BIASED, INCOMPETENT COURT REPORTER WHO TRANSCRIBED THE PROCEEDINGS.

This Court should make a finding of fact that the entire reporter's record is lost because there are thousands of serious disputes about its accuracy and completeness that cannot be resolved by a judge who did not preside over the trial without the assistance of the biased, dishonest official court reporter who incompetently transcribed the proceedings. There is ample precedent for a trial judge to make such a finding and overwhelming evidence to support it.

Many Texas courts have held that a record was lost as a matter of law because the official court reporter died or was too ill to correct the grossly inaccurate or unintelligible record that she created. *Hartgraves v. State*, 374 S.W.2d 888 (Tex.Crim.App.1964); *Seliger v. State*, 137 Tex.Crim. 26, 138 S.W.2d 817 (1940); *McNabb v. State*, 137 Tex.Crim. 463, 132 S.W.2d 273 (1939); *Brannan v. State*, 137 Tex.Crim. 611, 132 S.W.2d 594 (1939); *Little v. State*, 131 Tex.Crim. 164, 97 S.W.2d 479 (1936); *Gillen v. Williams Brothers*, 933 S.W.2d 162 (Tex.App. - Houston [14th Dist.] 1996, no writ); *Broussard v. ABC Home Health Svc.*, 1999 Tex.App.

Appendix F

(Tex.App. - Houston [14th Dist.] LEXIS 8383; *Hernandez v. JLG Industries*, 905 S.W.2d 778 (Tex.App. - San Antonio 1995, no writ). Although Halsey is alive, she is not available to correct the grossly inaccurate record that she created because she invoked her right to remain silent and her court reporter's license has been revoked.

This Court's ability to settle disputes about the record without the assistance of the official reporter would be impaired under the best of circumstances because the Court did not preside over the trial. It does not comport with human experience that anyone who attended the trial could recall specifically the words or events as to any particular proceeding. Is the Court prepared to rely on extrinsic evidence of the recollections of people who attended the trial or participated in it to determine what happened? Dozens of jurors who answered hundreds of important voir dire questions by nodding and shaking their heads and muttering "uh-huh" would be asked to recall what their head movements were. The Court would have to decide whether their memory of what they intended to say tainted their memory of whether they nodded a yes or shook a no.

The Court no doubt would have to resolve thousands of swearing contests. The five partisan defense lawyers and three partisan prosecutors probably will not agree about anything. Each side could hunt for spectators to corroborate their recollections of what happened at the trial. News reporters would be subpoenaed and cross-examined about the accuracy of their stories. The Court might even be placed in the position of having to judge the credibility of Judge Tolle's recollections. The very rules and statutes mandating court

reporters and their duties would be unnecessary if the human experience proved persons could remember the verbatim utterances of trial participants.

The Court cannot avoid these problems by adopting Simmons' opinion that her record conforms to what happened at the trial without personally reviewing the materials that she used to create it and the evidence that the defendant introduced to impeach her. Merely adopting Simmons' opinion would improperly delegate judicial authority to the court reporter because a court reporter's opinion about the accuracy and completeness of her own record of a trial that she did not attend lacks the foundation necessary for such an opinion to be admissible. Simmons is even *less* qualified than the laymen who attended the trial to give an opinion about what happened because she had no recollection to refresh when she listened to the tapes.

If Simmons' opinion about the accuracy of her own record is treated as expert testimony, the court must review the defendant's English translation of Halsey's steno notes and listen to the audio tapes that Simmons relied on to determine whether Simmons' opinion should be believed. *See Taylor v. State*, 938 S.W.2d 754 (Tex.App. - Waco 1997, no pet.) (court must compare hard copy of record to the official electronic or stenographic when defendant alleged that hard copy did not conform to official record).

The Court also did not completely remove the taint that Halsey placed on the entire record by having Simmons use her work product to create a new one. Simmons is not qualified to give an opinion about whether Halsey erased or

tampered with any of the audio tapes that she relied on so heavily. There has been no systematic review of the real record of this case, that being Halsey's steno notes. However, given the massive discrepancies from the tapes compared to the Halsey record, the Court is able to conclude Halsey's note-taking skills were unacceptable. The Court has sworn in an affidavit that it would never allow Halsey to work as a reporter because her honesty and competence are questionable at best. The State has argued that Halsey should not be paid for any of the work that she did in this case because it was worthless. It is impossible to trust anything that passed through Halsey's hands because her worst acts of misconduct were motivated by her bias against the defendant. There is a presumption of harm when the official reporter "so forgot the requirements of that office" because she must be "perceived as absolutely neutral with no interest in the outcome nor involvement with the substance of the proceedings." *People v. Oliver*, 196 Cal. App. 3d 423, 434 (1987).

In *Little v. State*, *supra*, 97 S.W.2d at 479, a trial judge faced with the same task presented here informed the Court of Criminal Appeals that he could not and would not attempt to resolve a massive dispute about the record of a capital trial that was prepared by a reporter who did not attend it. The official court reporter in that case died before he could transcribe his stenographic notes. The district attorney obtained the notes and had another licensed court reporter transcribe them. The defendant disputed the accuracy of the State's proposed record and submitted his own version. There were thousands of disagreements between the two versions of the record that the trial judge had to resolve before an

official record could be certified and filed. The trial judge found that because "the court reporter who took shorthand notes of this testimony down at the time of the trial is dead, this court on such a vital question with the death penalty involved, could not *in good conscience* from recollection prepare a statement of facts" that fairly settled all of the disputes about the record. *Little v. State*, *supra*, 97 S.W.2d at 480. (Emphasis added.)

This Court is in a worse position than the trial judge in *Little v. State* because it has no recollection of the trial and the official reporter was dishonest, incompetent, and biased. The Court could blindly accept Simmons' transcription of uncertified, unauthenticated audio tapes of proceedings that she did not attend without reading her record and listening to the tapes and allow the Court of Criminal Appeals to decide whether that band aid covers the wounds that Halsey inflicted on the record. The question is whether the Court can do so *in good conscience* knowing that the judges in Austin will defer to its findings of fact. The defendant submits that the risk of error and the life or death consequences of a single mistake in the record are too great for the Court to assume that responsibility.

WHEREFORE, for the reasons stated above, the Court should confirm its previous finding that the original reporter's record in this cause does not conform to what happened at trial and the Court should make the additional finding that it cannot be corrected or replaced. In the alternative, the Court should conduct a hearing to determine whether significant parts of the reporter's record were lost or destroyed and resolve all of the disputes about the accuracy of the portions of the record that Simmons is prepared to certify.

Appendix F

Respectfully submitted,

s/ J. Stephen Cooper
J. STEPHEN COOPER

3524 Fairmount Street
Dallas, Texas 75219
214-522-0670
FAX 214-522-0670
SBN 04780100

STEVEN LOSCH

906 Delia Drive
Longview, Texas 75601
903-234-1373
SBN 00789805

Counsel for Defendant-Appellant

APPENDIX G — DEFENDANT-APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING TO RESOLVE ALL OF THE FACTUAL DISPUTES ABOUT THE REPORTER'S RECORD FILED MARCH 2, 2000

No. F96-39973-MJ

IN THE CRIMINAL DISTRICT COURT
NO. 3 OF
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

v.

DARLIE LYNN ROUTIER

DEFENDANT-APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING TO RESOLVE ALL OF THE FACTUAL DISPUTES ABOUT THE REPORTER'S RECORD

THIS COURT HAS THE AUTHORITY AND THE DUTY TO CONDUCT AN EVIDENTIARY HEARING TO SETTLE ALL OF THE FACTUAL DISPUTES ABOUT THE COMPLETENESS AND ACCURACY OF THE REPORTER'S RECORD.

INTRODUCTION

The defendant is requesting an evidentiary hearing to determine the facts about each of her objections to the proposed new reporter's record of her trial, unless the State will stipulate to the facts that she alleged.

Appendix G

The Trial Court's Duty to Conduct a Hearing Under TEX.R.APP.P. 34.6(f)

The defendant's objections to the loss or destruction of parts of the record are governed by TEX.R.APP.P. 34.6(f). Rule 34.6(f) provides that a defendant is entitled to a new trial if four conditions are satisfied: (1) she requested a reporter's record; (2) a significant portion of the court reporter's notes and records has been lost or destroyed through no fault of the appellant; (3) the lost or destroyed part of the record is necessary to the appeal's resolution and (4) the parties cannot agree on a complete reporter's record.

Whether part of the record was lost or destroyed through no fault of the defendant is clearly a question of fact for the trial court to decide after a hearing. *Dunn v. State*, 733 S.W.2d 212, 215-16 (Tex.Crim.App. 1987). If the trial court found that any part of the record was lost or destroyed through no fault of the appellant, the Court of Criminal Appeals must decide whether is it was significant and necessary to the appeal's resolution because that question requires the application of a legal harmless error standard to the facts that the trial court found. *Isaac v. State*, 989 S.W.2d 754 (Tex.Crim.App. 1999).

The Trial Court's Duty to Conduct a Hearing Under TEX.R.APP.P. 34.6(e)

The defendant's objections to the accuracy of specific parts of the proposed new reporter's record are governed by TEX.R.APP.P. 34.6(e). Rule 34.6(e) provides three alternative procedures for resolving those objections:

(1) by agreement; (2) by the trial court; and (3) by the trial court after filing in the appellate court.

The defendant's original objections to the accuracy of the Halsey record were made in the Court of Criminal Appeals pursuant to Rule 34.6(e)(3), after it was filed. The defendant's objections to the accuracy of the Simmons record are made in the trial court now pursuant to Rule 34.6(e)(2), before a final version of that record is filed.

Rule 34.6(e)(2) provides that when the parties dispute whether the reporter's record accurately discloses what occurred at the trial, the trial court "must- after notice *and hearing s*ettle the dispute, order the court reporter to conform the reporter's record to what occurred in the trial court and to certify and file in the appellate court a corrected reporter's record." (Emphasis added.) The trial court must hear the evidence, decide what happened at the trial, determine whether the record conforms to it and order the reporter to correct any mistakes because an appellate court has no authority to conduct a hearing, (*Goode v. Shoukfeh*, 915 S.W.2d 666, 671 n.6 (Tex.App. - Amarillo 1996), *aff'd*, 943 S.W.2d 441 (Tex.) (and cases cited therein)); determine the facts de novo, (*Taylor v. State*, 938 S.W.2d 754 (Tex.App. - Waco 1997, no pet.)); or make any changes in the record. (*Johnson v. State*, 924 S.W.2d 750 (Tex.App. - Houston [1st Dist.] 1996, no pet)).

It would be fundamentally unfair to overrule the defendant's objections to specific inaccuracies in the reporter's record without giving her an opportunity to introduce evidence at a hearing because she has the burden

of proof. The fact that Simmons found 33,000 errors in the Halsey record cannot prove that the Simmons record is inaccurate. *Born v. Virginia City Dance Hall*, 857 S.W.2d 951, 953-54 (Tex.App. - Houston [14th Dist.] 1993, writ denied) (refusing to presume that entire record was inaccurate because of a few dozen specific mistakes); *Williams v. State*, 427 S.W.2d 868 (Tex.Crim.App. 1967) (record prepared by transcribing deceased reporter's notes was acceptable because defendant did not take advantage of opportunity to prove at a hearing that it was inaccurate or incomplete).

Due Process

The due process guarantees under the Constitutions of this State and of the United States also require an adversarial hearing on the defendant's objections to the accuracy and completeness of the reporter's record because she has made a credible allegation that the official court reporter was biased against her. *Chessman v. Teets*, 354 U.S. 156 (1957).

Appendix G

QUESTIONS OF FACT ABOUT THE DEFENDANT'S OBJECTIONS TO THE PROPOSED NEW REPORTER'S RECORD THAT MUST BE RESOLVED AT A HEARING

1. THE REPORTER'S RECORD OF A HEARING THAT WAS CONDUCTED TO DETERMINE WHETHER TRIAL COUNSEL DOUGLAS MULDER HAD A CONFLICT OF INTEREST WAS LOST OR DESTROYED.

1. Whether Judge Tolle conducted a significant hearing about the conflict resulting from Mulder's representation of the defendant's husband that does not appear in the Simmons record prior to the filing of the State's motion to conduct such a hearing on November 12, 1996.

2. Whether Judge Tolle conducted a significant hearing about the conflict resulting from Mulder's representation of the defendant's husband that does not appear in the Simmons record after the State filed a motion to conduct such a hearing on November 12, 1996.

3. If Judge Tolle conducted a significant hearing about the conflict resulting from Mulder's representation of the defendant's husband that does not appear in the Simmons record, did Halsey

make a stenographic and/or electronic record of the hearing that was lost or destroyed through no fault of the defendant.

4. Whether the statements of Judge Tolle, the attorneys for both sides, the defendant, and Halsey in the Simmons record about the hearing to determine whether Mulder had a conflict because of his representation of the defendant's husband are more credible than any extrinsic evidence that those persons could give.

2. A SIGNIFICANT PART OF THE REPORTER'S RECORD NECESSARY TO THE APPEAL WAS LOST OR DESTROYED BECAUSE THE RECORD OF THE PROCEEDINGS ON THE MORNING OF OCTOBER 21, 1996, THAT SIMMONS CANNOT CERTIFY IS ESSENTIAL TO DETER-MINE WHETHER THE DEFENDANT WAIVED THE CONFLICT OF INTEREST THAT RESULTED FROM MULDER'S REPRESENTATION OF HER HUSBAND.

Appendix G

3. OTHER SIGNIFICANT PARTS OF THE REPORTER'S RECORD OF THE PROCEEDINGS ON OCTOBER 21, 1996, WHICH ARE NECESSARY TO THE APPEAL WERE LOST OR DESTROYED.

1. Whether the certificate on the hard copy of the Halsey record of the proceedings on the morning of October 21, 1996, is factually false.

2. Whether the certificate on the hard copy of the Halsey record of the proceedings on the morning of October 21, 1996, is not credible.

3. Whether the record of the proceedings on the morning of October 21, 1996, was lost because the official reporter's certification of the record was false (and/or not credible), she cannot correct that defect because she lost her court reporter's license and another court reporter cannot certify that her stenographic notes are accurate and complete.

4. Whether the defendant was arraigned pursuant to TEX.CODE CRIM.PROC.ANN. art. 26.11, V.A.C.C.P. on the morning of October 21, 1996, as Halsey's stenographic record shows, or January 6, 1997, as the docket sheet states.

5. Whether evidence and testimony was introduced at the October 21, 1996, hearing on

the motion to substitute counsel, as the docket sheet states.

4. THE REPORTER'S RECORD OF HUNDREDS OF ANSWERS TO IMPORTANT VOIR DIRE QUESTIONS IS LOST BECAUSE HALSEY USED PARENTHETICAL DESCRIP-TIONS OF THE JURORS' HEAD NODS AND SHAKES TO INTERPRET THEIR UNINTELLIGIBLE RESPONSES AND SIMMONS CANNOT CERTIFY THAT HALSEY'S STENOGRAPHIC NOTES ABOUT THEIR HEAD MOVEMENTS ARE ACCURATE.

1. Whether Simmons cannot certify that the parenthetical descriptions of the jurors' non-testimonial answers to voir dire questions are accurate.

2. If so, whether the record of the juror's non-testimonial answers to voir dire questions was lost because the certificate on Halsey's record was false (and/or not credible).

3. If the record of the juror's non-testimonial answers to voir dire questions was not lost, whether it is not possible for the Court to determine if the parenthetical descriptions of the

jurors' non-testimonial answers to voir dire questions conform to what happened at the trial.

4. If the record of the juror's non-testimonial answers to voir dire questions was not lost and it is not possible for the Court to determine if the parenthetical descriptions of the jurors' non-testimonial answers to voir dire questions conform to what happened at the trial, whether each of those parentheticals is accurate.

5. THE DEFENDANT DISPUTES THE ACCURACY OF ALL OF THE PARENTHETICAL DESCRIPTIONS OF NON-TESTIMONIAL FACTS ABOUT HER PRESENCE AND THE PRESENCE OF THE JUDGE, JURY, AND THE ATTORNEYS BECAUSE SIMMONS CANNOT CERTIFY THAT THEY ARE TRUE AND CORRECT.

1. Whether the record of the presence of the defendant, the attorneys, the judge, and the jurors at times when they were not speaking was lost, because Simmons cannot certify the parenthetical descriptions of those non-testimonial facts and Halsey's certification of the record was false (and/or not credible).

2. Whether it is not accurate to presume that the defendant, the attorneys, the judge, and the jurors

were present during the trial when they were not speaking unless Halsey made a stenographic record of their absence because Halsey did not rely on that presumption of regularity.

3. Whether it is not possible for the Court to determine whether the parenthetical descriptions about the presence of the trial participants conform to what happened at the trial.

4. If the record of the presence of the trial participants was not lost and the Court can determine whether it is accurate, does each parenthetical about their presence conform to what happened at the trial.

6. EVERY PART OF THE SIMMONS RECORD THAT DOES NOT CONFORM TO THE OFFICIAL STENOGRAPHIC RECORD OF THE TRIAL IS INACCURATE AND CANNOT BE CERTIFIED.

1. Whether the English translation of Halsey's stenographic notes that the defendant introduced is a complete and accurate transcript of her notes.

2. Whether each part of the Simmons record that is substantively different from the English translation of Halsey's stenographic notes conforms to what happened at the trial.

Appendix G

3. In each instance where there is a substantive discrepancy between the Simmons record and Halsey's stenographic notes and/or the hard copy of Halsey's record, did Simmons rely on the audio tape to make that part of the record.

4. In each instance where there is a substantive discrepancy between the Simmons record and the hard copy of the Halsey record, did Simmons rely on the audio tape to make that part of the record.

5. In each instance where Simmons used an audio tape to make a substantive addition, deletion, or change in the hard copy of the Halsey record that did not conform to Halsey's stenographic notes, did that part of the Simmons record conform to what was on the tape.

6. In each instance where the Simmons and Halsey records and the audio tapes are identical, did Simmons and/or her scopist compare that part of the Halsey record to Halsey's stenographic notes?

7. Was Simmons' prior testimony inaccurate to the extent that she suggested that she and/or her scopist frequently compared parts of the Halsey record that clearly agreed with the audio tapes to Halsey's steno notes.

8. Whether Simmons violated the standards and practices of Texas court reporters by using

uncertified audio tapes and stenographic notes of a reporter whose impartiality, honesty, and competence were questionable at best to create a certifiable record of a trial that she did not attend.

7. SIMMONS' IDENTIFICATIONS OF VOICES WHO DID NOT IDENTIFY THEMSELVES WHEN THEY SPOKE ARE INACCURATE AND CANNOT BE CERTIFIED BY A REPORTER WHO DOES NOT HAVE PERSONAL KNOWLEDGE OF THEIR IDENTITY.

1. In each instance where Simmons identified a voice of a person who did not identify himself when he spoke, did she correctly identify the speaker.

8. THE SIMMONS RECORD DESCRIBES EVENTS THAT OCCURRED OFF THE RECORD.

1. In each instance, did the event occur off the record.

9. THE ENTIRE REPORTER'S RECORD IS LOST BECAUSE IT IS IMPOSSIBLE FOR A JUDGE WHO DID NOT ATTEND THE TRIAL TO SETTLE THOUSANDS OF SERIOUS DISPUTES ABOUT ITS

Appendix G

ACCURACY AND COMPLETENESS WITHOUT THE ASSISTANCE OF THE BIASED, INCOMPETENT COURT REPORTER WHO TRANSCRIBED THE PROCEEDINGS.

1. Whether it is not possible for the court to settle all of the material factual disputes about the completeness and accuracy of the reporter's record and have Simmons certify a new record that conforms to what happened at the trial.

2. Whether Halsey's motive and opportunity to erase anything on the audio tapes that would have disclosed a fatal defect in her record was too great to allow another reporter to use the tapes to make substantive additions, deletions or changes in the record.

WHEREFORE, for the reasons stated above, the Court should conduct an evidentiary hearing to settle all of the factual disputes about the defendant's objections to the proposed new reporter's record.

Respectfully submitted,

s/ J. Stephen Cooper
J. STEPHEN COOPER
3524 Fairmount Street
Dallas, Texas 75219
214-522-0670
FAX 214-522-0670
SBN 04780100

Appendix G

STEVEN LOSCH
906 Delia Drive
Longview, Texas. 75601
903-234-1373
SBN 00789805

Counsel for Defendant-Appellant

APPENDIX H —TRIAL COURT'S ORDER DATED SEPTEMBER 7, 2000

IN THE CRIMINAL DISTRICT COURT NO. 3
DALLAS COUNTY, TEXAS

Case No. F96-39973-MJ
Kerr County No. A96-253
Court of Criminal Appeals No. 72,795

THE STATE OF TEXAS

V.

DARLIE LYNN ROUTIER

COURT'S FINDINGS ON REPORTER'S RECORD

The court has reviewed the orders issued by the Court of Criminal Appeals to this court dated October 14, 1998 and April 26, 1999, which direct this court to ensure that the reporter's record is made to conform to what occurred at trial. The court has further reviewed each of the statements of fact from all of the hearings conducted by this court on the matter of the reporter's record in this case, and the findings and orders of this court following each of those hearings.

The court has also considered at great length the Defendant/Appellant's objections to the reporter's record, the State's responses thereto, the evidence adduced at each of the hearings on this matter, and the argument of counsel at such hearings.

Appendix H

The court finds that Defendant/Appellant's objections are clear, concise, and sufficiently apprise this court and will apprise the Court of Criminal Appeals as to Defendant/Appellant's objections.

The court finds that the Defendant/Appellant has adequately preserved her objections for review, and that any tribunal would be able to discern Defendant/Appellant's objections and the basis for them.

The court finds that the motions to suppress filed by Defendant/Appellant are not subject to a hearing by this court because they are beyond the scope of what this court was ordered to do by the Court of Criminal Appeals.

The court finds that any additional evidentiary hearing is not necessary to comply with the orders of the Court of Criminal Appeals.

The court finds that the orders of the Court of Criminal Appeals directing this court to ensure that the record conforms to what occurred at trial have been complied with, and this court incorporates all prior findings and orders previously issued by this court.

IT IS THEREFORE ORDERED that Defendant/Appellant's objections to the record filed with this court, along with all previous transcripts of hearings, orders, and findings issued by this court, be remanded to the Court of Criminal Appeals for consideration. No additional evidentiary hearings shall be conducted on this matter by this court unless the Court of Criminal Appeals instructs otherwise.

SIGNED this 7 day of September, 2000.

s/ Robert W. Francis
ROBERT W. FRANCIS, JUDGE
CRIMINAL DISTRICT COURT NO. 3
DALLAS COUNTY, TEXAS

APPENDIX I — APPELLANT'S OBJECTIONS TO NEW REPORTER'S RECORD AND MOTION TO ORDER THE TRIAL COURT TO CONDUCT A HEARING FILED JANUARY 23, 2001

No. 72,795

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DARLIE LYNN ROUTIER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

APPELLANT'S OBJECTIONS TO NEW REPORTER'S RECORD AND MOTION TO ORDER THE TRIAL COURT TO CONDUCT A HEARING

On Appeal from the
Criminal District Court No. 3 of
Dallas County, Texas
Trial Court No. F96-39973-J

Appendix I

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, DARLIE LYNN ROUTIER, Appellant in the above styled and numbered cause, and moves this Court to order the trial court to conduct an evidentiary hearing on her objections to the new reporter's record. Appellant further moves the Court to consider this Motion ***en banc***. In support of this motion, the Appellant would show the following:

INTRODUCTION

This motion is brought pursuant to TEX.R.APP.P. 34.6(e)(3) which provides that an appellate court may direct a trial court to resolve disputes regarding the accuracy of the appellate record.

The history of this case pertaining to the accuracy of the appellate record is extensive.

Appellant previously filed motions in this Court seeking corrections to the original reporter's record prepared by Sandra Halsey. By orders dated October 14, 1998, and April 26, 1999, this Court directed the trial court to ensure that the reporter's record is made to conform to what occurred at trial. In a series of hearings and series of orders of the trial court, ultimately the Halsey record was ordered stricken by the trial court and a new reporter's record has been filed in this Court. Some confusion existed in the trial court as to the breadth of this Court's previous orders to correct the Halsey record and this confusion extended apparently to personnel of this Court.

This was apparent when this Court assured appellant that her brief would not be due until 30 days after the trial court enters an order resolving the accuracy of the appellate record.[1] However, on the eve of a scheduled hearing on appellant's objections to the new reporter's record, the trial court issued an order which concluded it had already complied with this court's previous orders and that it could not resolve the objections to the new reporter's record unless specifically authorized by this Court to do so. 2 SCR(Supplemental Clerk's Record, Vol. 2)-368; App.(Appendix) 12.[2]

Although there were a multitude of hearings in the trial court, it would be illogical and fundamentally unfair to treat any of the proceedings that the trial court conducted as a hearing on her objections to the accuracy and completeness of the new record. Appellant did not receive notice that the proceedings were conducted for the purpose of resolving the disputes about the new record. All of the proceedings occurred before Appellant received her copy of the 50 new volumes of the record, reviewed the 30,000+ changes that the new court reporter made, and filed her objections to the new record. Some of Appellant's most important objections to the new record were based on facts that did not exist at the time of the proceedings. Appellant never had a chance to call any witnesses or question the new court reporter. All of the basic requirements of due process would be violated if the disputes about the record in this capital case were settled in that manner.

---

1. The promise was made in a letter signed by Chief Deputy Clerk George Miller on January 3, 2000. App. 8.

2. At the time of this order, the new reporter's record had already been filed in this Court.

Furthermore, despite all its other efforts to produce an accurate reporter's record, the trial court has yet to address one of the specific issues raised in Appellant's Motion To Correct/Clarify Reporter's Record filed on October 13, 1998, which this Court granted and directed the court to resolve in this Court's order of October 14, 1998. Specifically, Appellant complained of the absence of any reference in the record to the Appellant's presence or absence during the trial court's consideration and ruling on two of three jury notes. 1 SCR-39-41; App. 1. No action on this issue was taken by the trial court before (or even after) filing the new reporter's record in this Court. Questions never asked of either the original or new court reporter were whether the stenographic notes reflect the Appellant's presence and, if not, the bases for the parentheticals or lack thereof in both versions of the reporter's record as to Appellant's presence or absence at these times. As will be developed more thoroughly later in this motion, the new reporter contradictorily adopted most (but not all) of the original reporter's parentheticals while personally expressing the opinion, which was adopted by the trial court, that the original reporter's record could not be relied upon as accurate.[3]

---

3. A rudimentary example of one type of question which needs to be addressed is found in a comparison of page 5365 in Volume 47 of the Sandra Halsey record with that of page 5367 of Volume 47 of the new reporter's record. According to Halsey, the trial judge opened the proceedings of that day with "All right. Today is Saturday, February 1st, 1997, The time now is 12:20 P.M." The new reporter's record struck out all the above except "All right."

Now just where did Sandra Halsey come up with this language if it wasn't spoken in the courtroom? As will be developed later, the

(Cont'd)

Appendix I

The Court should not require Appellant to file her brief before it decides whether she is entitled to a hearing on her objections to the new reporter's record. To do so would cause an unjustifiable waste of judicial resources under the facts of this case and precedent of this Court.

In *County v. State*, 668 S.W.2d 303, 317 (Tex.Crim.App. 1989) (McCormick, PJ. concurring) the appeal was abated to resolve a factual dispute about the most important part of the reporter's record. This abatement occurred during consideration of the appellant's motion for rehearing after this Court had affirmed the appellant's conviction and death sentence. Subsequently, the trial court corrected and supplemented the record and this Court reversed the appellant's conviction because of the changes in the record. 812 S.W.2d at 316-17. Presiding Judge McCormick concurred with that result, but he stated:

> How such inaccuracies in the record which directly related to the main issue presented could have been so glaring and go unnoticed for so long

---

(Cont'd)
new reporter didn't put anything in the record which she couldn't corroborate by hearing it on the audiotapes. But unanswered is whether the official record of this trial, i.e., the paper stenographic notes, contains keystrokes which translated to the now omitted language. While Appellant is not now arguing the significance of these differences in this specific example, she is demonstrating the type of contradictions found throughout a comparison of the old record with the new. These multitudes of contradictions *are* matters of substance in many significant areas of the trial, as was sufficiently demonstrated in Appellant's written objections in the trial court that were never ruled upon.

> is, indeed, appalling. . . . I write this concurrence to iterate the true intent of Rule 55 of Appellate Procedure [which is now codified in TEX.R.APP.P. 34.6(e)] *disputes in the record should be resolved before briefs are filed and the cause is submitted to the appellate court.*

812 S.W.2d at 317-18 (McCormick, PJ. concurring) (emphasis added).

"Few cases in recent memory present such a chequered history," *County v. State*, 812 S.W.2d at 317 (McCormick, PJ. concurring), but that history will repeat itself here if the Presiding Judge McCormick's advice goes unheeded. There is already a glaring need for a hearing on Appellant's objections to the new reporter's record[4] and the outcome of her appeal will very likely depend on how the disputes about the record are settled.[5]

---

4. The legal and factual bases for Appellant's objections to the new record and request for a hearing were fully briefed in two pleadings that she filed in the trial court. Both of those pleadings are included in the Appendix to this motion, App. 10 and 11, and they also appear in a supplemental clerk's record. 2 SCR-480, 490.

5. For example, the trial court did not decide whether the reporter's record of a hearing to determine whether counsel had a conflict of interest was lost or destroyed. Appellant would be entitled to a new trial if that part of the record was lost or destroyed because it is significant and necessary to her appeal. *See* TEX.R.APP.P. 34.6(f); *Calloway v. State*, 699 S.W.2d 824, 829 (Tex.Crim.App. 1985) (failure to conduct hearing about potential conflict cannot be harmless if trial judge was aware of it).

Appendix I

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant's Initial Objection to the Accuracy of the Original Reporter's Record

The original reporter's record in this case was prepared, certified, and filed by the official court reporter, Sandra Halsey, after this Court held her in contempt for disobeying several filing deadlines.

The first dispute about the accuracy of Halsey's record was raised in APPELLANT'S MOTION TO CORRECT/ CLARIFY REPORTER'S RECORD filed in this Court on October 13, 1998. 1 SCR-39; App. 1. Along with questions about the jury notes, Appellant alleged that there were substantive discrepancies between the reporter's record of a portion of Darin Routier's testimony and a transcript of the same portion of his testimony found in the clerk's record that was read back to the jurors during their deliberations. 1 SCR-48-51; CR 155-57; 42 HR 4376-79.[6] Appellant asked this Court to remand the case pursuant to TEX.R.APP.P. 34.6(e)(2)(3), for the trial court to determine whether the record of that part of Darin Routier's testimony was inaccurate. 1 SCR-43; App. 1, pp. 3-4.

On October 14, 1998, this Court issued an order which stated: "... the dispute is submitted to the trial court for resolution. The trial court must ensure that the reporter's record is made to conform to what happened at trial." 1 SCR-52; App. 1.

---

6. The original reporter's record that Sandra Halsey filed is cited as (HR).

Appendix I

The Review of the Entire Reporter's Record that the Trial Court Ordered

On October 30, 1998, the trial court decided after a hearing that the accuracy of the entire reporter's record had to be reviewed to comply with this Court's order.[7] 1 SCR-11. Sandra Halsey testified that her stenographic notes of Appellant's trial were simultaneously typed on paper strips and computer edit disks that automatically translated the stenographic symbols into English. Vol. 1, p. 12.[8] Halsey testified that she also made audiotape recordings, but "[t]he only tapes that [she] had where the tape recorder was actually working were the ones from the jury voir dire." Vol. 1, p. 10. Halsey explained that the microphone on her tape recorder did not work during the remainder of the proceedings because it needed a battery. She claimed that she did not discover the problem until "after the trial was over." Vol. 1, p. 10.

The trial court ordered Halsey to review her entire record to determine whether it was accurate and correct any mistakes that she found. Vol. 1, pp. 15-17. The trial court also announced that it was going to appoint independent expert court reporters to compare the stenographic notes on Halsey's computer edit disks to the hard copy of her record so that

---

7. The trial judge who presided over the proceedings about the record, the Honorable Robert Francis, was not the judge who presided over the trial.

8. The 28 volume supplemental reporter's record of the proceedings that were conducted after the appellate record was filed is cited as "Vol.". The first volume was styled, perhaps wishfully, as a SOLO VOLUME without a number, but it is cited as "Vol. 1."

"if necessary, independent testimony or evidence can be given as to the ability to certify as to the Reporter's Record." Vol. 1, pp. 14-15.

On November 4, 1998, the trial court appointed three expert court reporters (Tommy Mullins, Judy Miller and Jerry Calloway) to review Halsey's record of both phases of the trial on the merits. Vol. 2, pp. 3, 13; 1 SCR-29.

The Stipulations About the Unauthenticated Audio Tape Recordings

Halsey met with Miller, Calloway, and Mullins and told each of them that she had no audiotapes of the trial on the merits. Vol. 3, pp. 12, 19, 25. However, at another hearing on November 13, 1998, the parties stipulated that Halsey told prosecutor Lindsay Roberts that there were audiotapes reflecting the trial proceedings of the guilt/innocence and punishment phases. Vol. 3, pp. 37-38; Court's Exhibit W, Vol. 3, p. 67. According to the stipulation, Roberts accompanied Halsey to a storage facility in Plano where he retrieved a box of audiotapes that were represented to him as the audiotapes for the Routier trial. Vol. 3, pp. 37-38.

Halsey's daughter, Suzy Crowley, was one of two scopists who helped Halsey edit her original stenographic record before she prepared a hard copy of it. Crowley testified that Halsey gave her audiotapes of the guilt and penalty phases of the trial and the original stenographic record of those proceedings that Halsey typed on computer edit disks. Crowley used the audiotapes to make permanent changes in the English translation of the original stenographic record

on the computer disks. Vol. 3, pp. 40-42, 46-49. Crowley did not do any work on the jury voir dire portion of the reporter's record because another person "scoped the jury voir dire." Vol. 3, p. 52.

Crowley looked through at some of the audiotapes that Halsey turned over to Roberts and testified that they "look[ed] similar" to the tapes that she used to change the computer disks. Vol. 3, p. 42-43. Crowley did not say whether Halsey gave Roberts all of the audiotapes of the guilt and penalty phases of the trial nor did she specifically identify the tapes displayed to her as being all the tapes she had reviewed. Vol. 3, pp. 42-43.

When the State introduced the audiotapes that Roberts received from Halsey and the stipulation, counsel objected that Appellant did not agree that these were in fact the tapes from the trial or that they were authentic. Vol. 3, p. 39. And the prosecutor confirmed that he was not making any representation to the court about the authenticity of the audiotapes. Vol. 3, p. 39. The tapes were admitted into evidence with the understanding that the question of their authenticity would be subject to further review. Vol. 3, p. 39. To date, the trial court has never ruled on that question.

On December 9, 1998, Halsey's lawyer produced 12 additional audiotape recordings to comply with a subpoena for all of her audiotapes of the trial. Vol. 7, pp. 3-9, 19-20; 1 SCR-23. No sworn testimony about the identity or history of the tapes has been introduced and they too have never been authenticated.

Appendix I

Halsey's Invocation of Her Right Against Self Incrimination

The trial court relieved Halsey of her duties as the official court reporter in this case with the consent of both sides after she turned over the unauthenticated audiotape recordings. Vol. 3, pp. 57-59; 1 SCR-21. When this hearing was reconvened counsel tried to question Halsey as a fact witness, but she invoked her right against self-incrimination after she testified that she was present at all of the proceedings in Appellant's case including the pretrial hearings. Vol. 5, p. 8-11.

The Findings and Recommendations of the Trial Court's Experts

On November 13, 1998, Miller, Calloway, and Mullins testified that they each reviewed Halsey's record of the part of Darin Routier's testimony that was read back to the jury and other selected excerpts of the reporter's record of the trial on the merits. Each expert compared the hard copy of those parts of the Halsey record to ~~the~~ stenographic symbols on Halsey's computer edit disks. Vol. 3, p. 8. Each expert testified that there were significant discrepancies between the hard copy of the record and the stenographic symbols on the disks. Vol. 3, pp. 14, 20, 35. In the opinion of each expert, it was clear that Halsey used audiotape recordings to make changes in the English translation of the stenographic record, and then printed a hard copy of the altered record and filed it with this Court. Vol. 3, pp. 12, 20, 26.

Appendix I

Each expert court reporter recommended that the entire Halsey record should be reviewed by another reporter. Vol. 3, pp. 14, 16, 22. Mullins, noting that the "stenographic notes [are] the official record of the court," Vol. 3, pp. 12-13, specifically recommended that Halsey's stenographic notes and the unauthenticated audiotapes should both be compared to the hard copy of Halsey's record. Vol. 3, p. 14-15.

The Trial Court's Order for a New Court Reporter to Review Halsey's Record of the Guilt and Punishment Phases of the Trial

The trial court accepted the recommendations of its experts to appoint a new court reporter to review Halsey's record. Vol. 3, pp. 59, 61. The parties agreed that Susan Simmons should do the job. Vol. 4, pp. 8-9.

The trial court initially ordered Simmons orally and in writing to compare the hard copy of the Halsey record of the guilt and punishment phases of the trial with Halsey's paper stenographer's notes, her computer edit disks and the tape recordings "in compliance with standard industry practice," make all corrections which she deemed necessary, produce a record "of everything she has reviewed" and certify to the accuracy of a new record, "if possible." Vol. 5, p. 16; 1 SCR-21.

When the trial court orally announced that order, counsel objected that it was not legally permissible for Simmons to certify a new record. Vol. 5, p. 18. The trial court responded, "I imagine that will be an issue taken up with a different court than this one." Vol. 5, p. 18.

Appendix I

On November 18, 1998, Appellant filed in this Court a motion to abate this appeal. This motion recited the developments in this case which had so far occurred pursuant to the proceedings conducted under the authority of this Court's order of October 14, 1998. However, it was then apparent that the errors in the Halsey record went far beyond those cited in Appellant's earlier motion to correct/clarify and that Sandra Halsey was refusing to participate in any correction of the record. In turn, the relief needed by Appellant to ensure an accurate appellate record went beyond that which this Court granted in its October order. Appellant requested an abatement to give the trial court jurisdiction to take such steps as necessary to ensure an accurate reporter's record.

This motion was denied, although this Court did extend the original 30 day deadline for compliance with the October order.

The Hearing to Determine Whether Simmons Could Certify a New Record of the Guilt and Punishment Phases of the Trial

On April 1, 1999, the trial court conducted a hearing which the trial court described as "a continuation of hearings which began after October the 14th of 1998, pursuant to an Order issued to this Court by the Court of Criminal Appeals on that date." Vol. 13, p. 3.

The trial court called Simmons and Tommy Mullins to testify as the court's witnesses. The attorneys were only allowed to propose questions for them in writing. Vol. 13,

p. 3-4. Appellant had filed a written objection that this procedure violated her constitutional rights to due process, effective assistance of counsel, and confrontation. Vol. 13, p. 4; 1 SCR-133; App. 3. The trial court overruled these objections and explained that Appellant would not be permitted to directly question the witnesses "because this is a fact finding hearing and I'm doing this at the direction of the Court of Criminal Appeals . . ." Vol. 13, p. 4-5. It is unclear whether the court was referring to this Court's direction to conduct this hearing or to not allow Appellant to question the witnesses. While conducting one or more hearings seems a logical extension of this Court's order of October 14, 1998, Appellant is unaware of any order of this Court not to permit counsel to question witnesses at any such hearing(s).

Simmons testified that she created her own new record of the guilt and punishment phases of the trial as well as a red-lined copy of the Halsey record that reflected all of the changes that she made. Vol. 13, pp. 24-29; Court's Exhibit AA; Court's Exhibit BB. Simmons had Halsey's original stenographic notes on paper strips, but she did not produce an English translation of them. Vol. 13, pp. 20, 50, 52-53. She did not know whether Halsey changed the original English translation of her stenographic notes on her computer disks before she surrendered the disks. Vol. 13, p. 51-52.

The procedure that Simmons used to create her new record was different than the procedure that a court reporter ordinarily uses to create a hard copy of the record from the original stenographic notes that were simultaneously typed during the trial on paper strips and the computer disks where

the reporter's symbols are automatically translated into English on a split screen. Vol. 13, p.p. 15-23. Simmons testified that the first step of the standard procedure is to load the original stenographic record that the reporter typed on her computer edit disks to a split computer screen that displays the stenographic symbols and an English translation of them side by side. Vol. 13, pp. 12-15. The reporter listens to an audiotape as she reads the English translation on the computer screen and makes any necessary changes in the English translation. Vol. 13, p. 16. The edited English translation on the screen is downloaded onto new computer disks, proof read, and saved again on the new disk. A hard copy of the proof read English translation on the new disks is printed out and filed with the court. Vol. 13, pp. 15-17.

Instead of the normal procedure, Simmons started by systematically comparing the hard copy of the Halsey record with the unauthenticated audiotapes instead of comparing the tapes to the English translation of the stenographic record on Halsey's computer disks which Halsey could have changed. Vol. 13, pp. 23; 51-52. When Simmons found a mistake in the hard copy of the Halsey record, she made a hand written change on it in red ink. Vol. 13, p. 23. She described this process as an audio edit of the Halsey record. Vol. 13, p. 28.[9]

---

9. There were two important differences between the procedure that Simmons used and the standard procedure that she described. The standard procedure uses the unedited English translation of the stenographic notes that were actually typed during the trial as the primary source of the record and preserves the original stenographic record for comparison with the hard copy of the edited record that is filed with a court.

Appendix I

Simmons had Halsey's original paper stenographic notes beside her when she used the unauthenticated audiotapes to change the hard copy of the Halsey record, Vol. 13, p. 23, but she did not systematically compare the notes to those materials. Simmons testified that she would only flip to the paper stenographic notes that Halsey typed if she came to a part of the hard copy of the Halsey record that she was unsure of when she compared it to the audiotape. Vol. 13, p. 24. Simmons explained that she also consulted the paper notes when she had a question about the identity of a speaker. Vol. 13, p. 36. She never indicated that she referred to the paper notes for any other purpose.[10]

Tommy Mullins testified that it was common practice for a court reporter to use audiotapes for "editing" purposes to create a record that is different in some respects from the original stenographic notes. Vol. 13, p. 48. Neither Mullins nor Simmons nor any other witness indicated what the usual level of discrepancy was or whether Halsey's record exceeded it. Both Mullins and Simmons agreed in response to the trial court's leading questions that it is normal for a new record and the original stenographic record not to match exactly. Vol. 13, pp. 48; 52-54.

Simmons testified that the unauthenticated audiotapes of the guilt and punishment phases of the trial were complete, audible and had no discernable gaps when she listened to

---

10. Simmons did not say whether she made any use of the symbolic and English versions of the Halsey record on the computer edit disks or whether she compared them to each other. She may have believed that the disks were not of any use to her because Halsey could have changed them. Vol. 13, pp. 51-52.

them, but she did not offer an expert opinion about whether any of the tapes were edited or erased before she received them. She acknowledged that her new record could be tainted if there was a defect in the tapes that she could not detect by playing them. Vol. 13, p. 36. She claimed that she could certify that her record was a true and correct transcription of what happened at the guilt and penalty phases of the trial even though she had no personal knowledge of the proceedings, the identity of the audiotapes, or their integrity. Vol. 13, pp. 37, 51.

Appellant filed and presented a written motion to make a bill of exception about some of the questions that she was not allowed to ask Simmons. Vol. 13, p. 4; 1 SCR-133; App. 3.[11] Appellant's bill stated that she would have asked Simmons whether she compared each line of the Halsey record to Halsey's original stenographic notes and if not, why. 1 SCR-134-5; App. 3, pp. 2-3. Her bill stated that she also would have asked Simmons to describe exactly how she used Halsey's original stenographic notes to prepare her record. 1 SCR-134; App. 3, p. 2. The trial court did not ask Simmons those specific questions.

---

11. The handwritten language and lines found on this motion in the Supplemental Clerk's Record were *not* on the pleading as filed and Appellant is not positive who added these markings.

Appendix I

Appellant's Request for an Opportunity to Call Witnesses to Testify About the New Record After She Reviewed It

Appellant's attorneys did not receive a copy of Simmons' new 28 volume record of the guilt and punishment phases until after Simmons finished her testimony. Vol. 13, p. 58. Counsel informed the trial court that he might want to call witnesses to testify about the new record after he reviewed it. Vol. 13, p. 58. The trial court responded, "we'll cross that bridge when we get to it." Vol. 13, p. 58.

Appellant's Objection to Filing the New Reporter's Record Before She Had an Opportunity to Review that Record and Compare It to Halsey's Original Stenographic Notes

Appellant filed written OBJECTIONS TO FILING A NEW OR CORRECTED COPY OF THE REPORTER'S RECORD and presented them to the trial court for a ruling at the beginning of the April 1, 1999, hearing. Vol. 13, p. 4; 1 SCR-139; App. 4. Appellant asserted in this pleading that she was unwilling to agree to the filing of the Simmons record without reading it because Simmons used the uncertified, unauthenticated audiotapes to create a new record instead of transcribing Halsey's stenographic notes. 1 SCR-142; App. 4, p. 4. Appellant further stated that she was unable to prove that there were specific discrepancies between the Simmons record and Halsey's steno notes because the trial court did not give her attorneys an opportunity to compare those materials. 1 SCR-147-8; App. 4, pp. 9-10. Appellant also asked the trial court to order Simmons to systematically

compare Halsey's stenographic notes to her record, the Halsey record, and the audiotapes or give her attorneys a reasonable opportunity to do so before a new record of the guilt and penalty phases was filed with this Court. 1 SCR-144-5; App. 4, pp. 6-7. The trial court promised to address those issues with a written order. Vol. 13, pp. 4, 57.

The Trial Court's Order to Replace the Original Reporter's Record of the Guilt and Penalty Phases of the Trial and Give Appellant an Opportunity to Object to the New Record After She Reviewed It

On April 14, 1999, the trial court signed an order which stated that the Halsey record of the guilt and punishment phases of the trial should be replaced by the Simmons record because Halsey's record of those proceedings did not conform to what happened at the trial. 1 SCR-127; App. 5. The trial court believed Simmons' testimony that her record of the proceedings was true and correct and arranged for her new record to be filed with this Court before Appellant had an opportunity to review it. 1 SCR-128-9; App. 5, pp. 2-3. The trial court did not independently review the new record before it made that finding. Vol. 20, p. 9.

The trial court's April 14, 1999 order gave Appellant 120 days to read the 28 new volumes that she received that day and file any objections to the new record or motions for further relief because the interests of justice required it. 1 SCR-128-9; App. 5, pp. 2-3.

Appendix I

The Hearing to Determine Whether Simmons Could Certify a New Record of the Voir Dire and Other Pretrial Proceedings

On April 26, 1999, this Court granted Appellant's motion to order the trial court to review Halsey's record of the voir dire and pretrial hearings to determine whether it conformed to what happened at the trial. App. 6.

On October 14, 1999, the trial court called Simmons as its witness and questioned her about her record of those proceedings again without allowing the attorneys to do so. Appellant renewed her objections to that procedure and they were overruled. Vol. 23, pp. 29-30. Simmons testified that she used the same materials and procedures to produce a new certified record of the voir dire and pretrial hearings that she used to prepare a new record of the guilt and penalty phases of the trial. Vol. 23, pp. 5-17.

The Trial Court's Order to Replace the Original Reporter's Record of the Voir Dire and Other Pretrial Proceedings and Give Appellant an Opportunity to Object to the New Record After She Reviewed It

On November 5, 1999, the trial court issued an order which stated that Halsey's record of the voir dire and pretrial hearings should be replaced by the Simmons record of those proceedings because it did not conform to what happened at the trial. 1 SCR-103; App. 7. The trial court believed Simmons' testimony that her record of those proceedings was true and correct, but it gave counsel an additional 120 days

to file any objections that she had to the Simmons record or motions for further relief. The trial court instructed Appellant to file a separate motion to request a hearing on her objections to the Simmons record that set forth in detail why a hearing is necessary. 1 SCR-105; App. 7, p. 3.

The Uncertified Part of the New Reporter's Record

On December 13, 1999, another hearing was conducted regarding the discovery that Simmons did not prepare a new record of the pretrial proceedings that were reported in Volumes 10 and 11 of Halsey's record. Simmons was instructed to review both volumes and certify a new record of those proceedings if she could. Vol. 25, pp. 3-7.

On January 28, 2000, Simmons testified about her review of Volumes 10 and 11. Simmons prepared a new certified record of the proceedings reported in Volume 11 and the proceeding on the afternoon of October 21, 1996, that was reported in Volume 10 by using the same procedures that she used to create the other parts of her new record. Vol. 26; pp. 5-9. Simmons *would not* certify a new record of the proceeding on the morning of October 21, 1996, that was reported in Volume 10 of the Halsey record. Vol. 26, pp. 9-13.

Simmons testified that she did not receive an audiotape of the proceeding that was conducted on the morning of October 21, 1996, and this was the reason she refused to certify this portion:

> Based on the 10,000 pages that I've done previous to this, and seeing Miss Halsey's record compared

> to her notes and the audiotape, I don't feel comfortable certifying to the first 53 pages without an audiotape to listen to.

Vol. 26, p. 13.

In Simmons' opinion, Halsey must have used an audiotape to edit that part of her record because the hard copy was different than her paper stenographic notes. Vol. 26, p. 19. Simmons physically included an English translation of Halsey's paper stenographic notes of the proceeding on the morning of October 21, 1996, in Volume 10 in her own record, but her certificate in that volume specifically excludes those 54 pages.[12] 10 SR (Simmons Record)-1-54.

On February 4, 2000, Halsey's attorney informed the trial court that she did not have an audiotape of the proceedings for the morning of October 21, 1996. Halsey's lawyer did not indicate whether she made a tape and lost or destroyed it. Vol. 27, pp. 3-4.

On February 9, 2000, the trial court issued an order that adopted Simmons' testimony about the pages in her record that she did not certify. 2 SCR-566; App. 9. The trial court

---

12. Appellant objected that Halsey's certificates on the original record could not be used to certify any part of the new one because she testified at her license revocation hearing that she knew that her record was inaccurate when she signed them. 2 SCR-501-3; App. 10, pp. 12-14; 35. The trial court did not rule on that objection, but Halsey's certificates were not included in any of the volumes of the new record.

did not decide whether the uncertified 54 page transcript of Halsey's stenographic notes of those proceedings in Volume 10 of the Simmons record conformed to what happened at the trial or whether there ever existed an audiotape for these 54 pages. 2 SCR-568; App. 9, p. 3. Again, however, the only testimony in this record on this subject is that of Simmons who stated that, in her opinion, there had been an audiotape used in the preparation of this part of the proceedings. Vol. 26, p. 19.

Appellant's Objections to the New Reporter's Record and Request for a Hearing

In its order dated February 9, 2000, the trial court extended the deadline until March 6, 2000, for Appellant to file objections to the Simmons record and request a hearing on them. 2 SCR-569.

On March 2, 2000, Appellant filed written objections to the Simmons record, 2 SCR-490; App. 10, and a separate motion for a hearing, 2 SCR-480; App. 11. Both pleadings also were submitted to this Court by a letter to the clerk dated March 8, 2000.

Appellant's motion for an evidentiary hearing identified twenty-seven specific disputed factual questions about the new record. 2 SCR-480; App. 11.

Appellant's nine objections to the new record were presented in a detailed twenty-eight page pleading. There was a point heading, statement of facts, and arguments and authorities for each objection. Her objections challenged

virtually all of the substantive changes that Simmons made in the record; the loss or destruction of specific parts of the record; the procedures that Simmons used to create her record; and the use of Halsey's certificates on the old record to certify any part of the new record that Simmons would not certify. 2 SCR-490; App. 10.

She promised to introduce an English translation of Halsey's original stenographic notes to prove her objection that Simmons used the unauthenticated audiotapes to make thousands of inaccurate substantive changes in the record. 2 SCR-508, n. 7; App. 10, p. 19, n. 7.

Numerous exhibits were attached to Appellant's objections to the new reporter's record to substantiate her allegations about facts that were not in the record of the previous proceedings that the trial court conducted. Appellant's exhibits included statements that Halsey made at a hearing to revoke her license and to the press after she invoked her Fifth Amendment right not to testify in this case. These included Halsey's concession that there could be something wrong with her own audiotapes and she would not depend on them. 2 SCR-558; App. 10, p. 69. Halsey warned that her audiotapes should not be used to create a record because they could be blipped. 2 SCR-558; App. 10, p. 69. Halsey confessed that she knew that her record was inaccurate when it was filed. 2 SCR-524; App. 10, p. 35. Halsey admitted that she lied to the trial court to try to conceal defects in her record because she did not want Appellant to get a new trial. 2 SCR-528; App. 10, p. 49. Among other things, she blamed this Court's "threatening me with jail" as why she filed her record knowing it was inaccurate. 2 SCR-525; App. 10, p. 36.

Appendix I

The trial court had previously stated it was "quite troubled" by the fact that a witness might "invoke her Fifth Amendment right not to testify here in court [and then] give their opinions to the press, attempting to influence public opinion . . . because this is not a game . . . There are definitely two children who are dead and a woman who been sentenced to death . . ." Vol. 27, p. 4.

Attached to these written objections were 42 pages of exhibits supporting the pleading. 2 SCR-490; App. 10, pp. 29-70. In its order of September 7, 2000, the trial court found that Appellant's "objections are clear, concise, and sufficiently apprise this court and will apprise the Court of Criminal Appeals as to [Appellant's] objections." The trial court further found Appellant "adequately preserved her objections for review."[13] 2 SCR-368; App. 12.

Of course, what Appellant was seeking went beyond a mere understanding of her objections: Appellant was then (and is now) seeking a *ruling* on these objections in a proceeding which comports with due process by permitting testimony, evidence, and argument.

Appellant would urge this Court, in consideration of this motion, to review in full Appellant's written objections filed in the trial court. 2 SCR-490; App. 10. Appellant would ask further that particular note be made of Exhibit E of the written

13. Since the issue of "preservation" of an objection is an appellate court determination, perhaps the most that can be said about these findings is that the objections were specific enough to leave no doubt that the trial court understood them.

objections.[14] Therein are listings of multiple substantive changes Simmons made in Halsey's reporting of non-verbal responses, among other things. For instance, during voir dire a juror, per Halsey, responded to a question by answering "Um-hum." 12 HR-367. However, Simmons revised this to "Uh-huh," which of course is inconsequential, but then Simmons added the parenthetical "(Witness nodding head affirmative)." 12 SR-367. Appellant will assume that Simmons could not hear on the audiotape the juror nodding his head. And since Simmons has testified it was not part of her job to deal with Halsey's parentheticals (2 SCR-556; App. 10; p. 67), just where did this new parenthetical come from? This same scenario is presented in comparing 12 HR-255 with 12 SR-254 as well as 13 HR-627 with 13 SR-668, to point out but a few. Simmons also changes responses of a juror, apparently based on whether she could hear it on the audiotape. See 13 HR-467 and 13 SR-467. Now Appellant understands as well as anybody Simmons' refusal to vouch for Halsey's steno notes or reporter's record without audiotape corroboration, but that only amplifies the problems presented by this record reconstruction effort to begin with, plus it places the parenthetical issue at the fore. The principle of presumed regularity cannot be applied to Halsey's parentheticals given her history of lying and knowingly submitting an inaccurate record. But coupling this with Simmons' stated refusal to put anything in her record which she could not corroborate, leaves *all* the parentheticals in this case subject to challenge. Are the above examples

---

14. This exhibit has a few erroneous citings to the record and it did not encompass the guilt and punishment phases. Appellant had a corrected and expanded version of this exhibit for introduction and use at the scheduled hearing of September 8, 2000.

significant errors warranting a new trial? Of course not, but there is a *Witherspoon* disqualified venireman for whom parentheticals describing his "nodding head affirmative" or "shaking head negative" will be critical for Appellant's error on disqualifying the juror. Plus, there are similar issues in the trial testimony which are not part of this record now because the trial court cancelled the hearing.

The issue at this stage of the proceedings is not "what difference does it make?" Rather, it is whether this record can be relied upon as accurate, made more accurate, or at least can the proceedings comport with due process in order for the ultimate issues to be decided with Appellant having an opportunity to make her case, an opportunity which so far has been denied.

The Cancellation of the Hearing on Appellant's Objections to the New Reporter's Record

The trial court set Appellant's case on the calendar for September 8, 2000, to conduct a hearing on her objections to the new reporter's record. 2 SCR-465; 391. Appellant served subpoenas for Halsey, Simmons and nine other witnesses to testify at the hearing. 2 SCR-560-1; 370-372; 374; 381; 383; 385; 387; 389. The trial court also signed Appellant's subpoena for an out of state witness who was flown from Virginia to Dallas at the expense of the taxpayers. 2 SCR-464-67. Appellant filed a motion to suppress the unauthenticated audio tapes. The State acknowledged in its response to the motion that it expected the trial court to conduct the hearing and allow the parties to question Simmons about the new record. 2 SCR-391. The trial court

cancelled the hearing on the day before it was scheduled to take place with the issuance of its September 7, 2000, order. 2 SCR-368; App. 12.[15]

The Trial Court's Response to Appellant's Objections to the New Reporter's Record and Request for a Hearing

On September 7, 2000, at 3:15 p.m., the trial court issued a one and a half page order which made the following findings:

> 1. The trial court found that it complied with all of the orders that the Court of Criminal Appeals issued before Appellant filed her objections to the new reporter's record;
>
> 2. All of the prior findings and orders previously issued by the trial court before Appellant filed her objections to the new record were incorporated without making any findings of fact or conclusions of law about those objections;
>
> 3. Appellant's written objections to the new reporter's record and motion for a hearing adequately preserved all of her claims because any tribunal would be able to discern the basis for them;

---

15. The docket sheet does not show that a hearing was scheduled on September 8, 2000, but Appellant filed formal and informal bills of exception to make a record of that fact. 2 SCR-282; 286; App. 13; 14. The trial court subsequently ruled that it did not have jurisdiction to approve her formal bill. 2 SCR-281; App. 15. The State will not dispute that a hearing was set as alleged.

4. An additional evidentiary hearing is *not necessary to comply with the orders of the Court of Criminal Appeals* that were issued before Appellant filed her objections to the new record; and

5. No additional evidentiary hearings shall be conducted by the trial court *unless the Court of Criminal Appeals instructs otherwise.*

2 SCR-368; App. 12. (Emphasis added.)

The Trial Court's Refusal to Act on Appellant's Formal Bill of Exception or to Allow Appellant to Make an Offer of Proof About the Evidence that She Would Have Introduced at the Hearing on Her Objections to the New Reporter's Record

On September 25, 2000, Appellant filed her Defendant's Formal Bill of Exception No. 1 together with a proposed order. 2 SCR-282; 285; App. 13. Contemporaneously with this pleading, Appellant filed a Motion For A Hearing To Make an Offer Of Proof Of The Evidence That She would Have Introduced At The Hearing On Her Objections To The "Simmons Record." 2 SCR-286; App. 14.

The trial court responded to these pleadings with an order on October 3, 2000, finding that "it lacks jurisdiction to consider any additional filings in this case unless the case is again remanded to this court by the Court of Criminal Appeals." 2 SCR-281; App. 15.

Appendix I

ARGUMENT AND AUTHORITIES

THIS COURT SHOULD REMAND THE CASE FOR AN EVIDENTIARY HEARING TO SETTLE ALL OF THE DISPUTES ABOUT THE NEW REPORTER'S RECORD BEFORE APPELLANT FILES HER BRIEF.

This case should be remanded for the trial court to conduct an evidentiary hearing on Appellant's objections to the new reporter's record before she files her brief. There are literally thousands of serious factual disputes about the accuracy and completeness of the new record that the trial court did not resolve. It would be fundamentally unfair and wasteful to require Appellant to request a hearing about those issues in her brief because it is already clear that her appeal cannot be decided without one.

1. THE RULES OF APPELLATE PROCEDURE WERE DESIGNED TO GIVE THE APPELLANT AN OPPORTUNITY TO SETTLE ALL OF THE DISPUTES ABOUT THE RECORD BEFORE SHE FILES HER BRIEF.

The rules for settling disputes about the reporter's record were designed to give this Appellant (and all other appellants) an opportunity to prove that it is inaccurate or incomplete before her brief is due because she cannot intelligently identify the potential points of error and supporting record references without knowing what the record will be. *Sankey v. State*, 3 S.W.3d 43, 44 (Tex.Crim.App. 1999). A remand for a hearing in the trial court is usually required

to provide that opportunity because defects in the record are ordinarily discovered after it was filed. *Sankey*, *supra*.

Claims of inaccuracy in the reporter's record are governed by TEX.R.APP.P. 34.6(e). Disputes as to the reporter's record which are raised prior to the record being filed with the appellate court "must" be resolved by the trial court "after notice and hearing." Rule 34.6(e)(2).

Claims of inaccuracies made after a record is filed with the appellate court may be referred back to the trial court which in turn "must then ensure that the reporter's record is made to conform to what occurred in the trial court." Rule 34.6(e)(3).

TEX.R.APP.P. 34.6(f) supplies a remedy for the loss or destruction of the reporter's record or part of it that usually cannot be implemented without a hearing in the trial court. Rule 34.6(f) requires a new trial if a significant part of the reporter's record necessary to the appeal was lost or destroyed through no fault of the appellant. A hearing must ordinarily be conducted in the trial court to determine whether there was a court proceeding that does not appear in the reporter's record; whether a stenographic record of the proceeding was made; whether the record was lost or destroyed; and whether the appellant was not responsible for it. *Dunn v. State*, 733 S.W.2d 212, 215-16 (Tex.Crim.App. 1987). The appellate courts only have to conduct a harm analysis to determine whether there must be a new trial after those facts are developed. *Isaac v. State*, 989 S.W.2d 754 (Tex.Crim.App. 1999).

Appendix I

Disputes about the accuracy and completeness of the appellate record can be settled after the briefs are filed because there is no deadline for raising the issue, *Riggs v. Tech./III Inc.*, 836 S.W.2d 302 (Tex.App.- Dallas 1992, no writ), but it is fundamentally unfair and wasteful to postpone a decision about whether to conduct a hearing on the matter until after the appellant filed a brief. *County v. State*, 668 S.W.2d at 317 (McCormick, PJ. concurring). This is especially true in capital cases because meaningful appellate review of a complete and accurate record is a constitutional requirement when the death penalty was imposed. *Dobbs v. Zant*, 506 U.S. 357 (1993);[16] *Dunn v. State*, 733 S.W.2d 212, 214 n.5 (Tex.Crim.App. 1987).

The potential costs of postponing the decision about whether to have a hearing on an objection to the accuracy and completeness of the record in a capital case until after the Appellant files her brief clearly outweigh the possible benefits. The administration of justice will be delayed and judicial resources will be squandered if the appeal must be abated or reconsidered to correct a defect in the record that could have been cured before the case was submitted. *County*

16. In *Dobbs v. Zant*, the Supreme Court had to order the transcription of the stenographic notes of part of a capital trial seven years after it occurred because the state courts and two lower federal courts refused to do so. 113 S. Ct. at 836. The appellant's death sentence was reversed five years later because of what occurred in that part of the record. *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998). The same thing could happen in this case if Appellant's death sentence is affirmed without a hearing on her objections to the new record because the original stenographic record of the trial has never been accurately transcribed or systematically compared to the new record.

v. State, *supra*, 668 S.W.2d at 317 (McCormick, PJ. concurring). Full briefing of a complaint about the record may reveal that the alleged defect is not harmful enough to be a reversible error, *Isaac v. State*, *supra*, but the harmless error doctrine does not apply to interlocutory disputes about the record that were raised in motions before the appeal was submitted.

2. THE TRIAL COURT DID NOT RESOLVE ANY OF THE FACTUAL DISPUTES ABOUT THE ACCURACY OR COMPLETENESS OF THE NEW REPORTER'S RECORD.

The trial court's very brief order on September 7, 2000, did not expressly or implicitly resolve any of the disputed questions of fact about the accuracy and completeness of the new reporter's record. The trial court only decided that it did not have the authority to conduct an evidentiary hearing to settle those disputes unless this Court expressly orders it. Any other interpretation of the trial court's order would mean that the trial court acted irrationally or intentionally disregarded the elementary requirements of due process.

A. It Was Reasonable for the Trial Court to Believe that It Had No Jurisdiction to Conduct a Hearing to Resolve the Disputes About the New Record Without an Order From this Court.

To determine what the trial court's order means, this Court should apply the well-settled rule that trial judges are presumed to know the law and to apply it in making their

decisions, unless the record shows otherwise. *Walton v. Arizona*, 497 U.S. 639,653 (1990). The plain language of Rule 34.6(e)(3) gives the *appellate* court discretion to decide whether a particular dispute about the reporter's record should be submitted to trial court after the record was filed. Rule 34.6(e)(2) *requires* the trial court to conduct such a hearing if the appellate court exercised that discretion, but the trial court correctly found that it had no power to conduct a hearing about a dispute that was not submitted to it for resolution.

The fact that the trial court found that it did not have *jurisdiction* to allow Appellant to make an offer of proof about the evidence that she would have introduced at a hearing on her objections to the new record confirms that the trial court believed that it did not have jurisdiction under Rule 34.6(e)(2) to conduct the hearing. *See Drew v. State*, 743 S.W.2d 207, 225-28 (Tex.Crim.App. 1987) (offer of proof about evidence Appellant would have presented at hearing cannot be considered if trial court had no jurisdiction to conduct the hearing).

A comparison of the language of Rule 34.6(e)(3) and the former TEX.R.APP.P. 55(a) should have convinced the trial court that an order from this Court to resolve the disputes about the new reporter's record at a hearing was not a mere formality. The former Rule 55(a) provided that when a dispute about the accuracy of the reporter's record was raised after it was filed, "the appellate court *shall* submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute." (Emphasis added.) Rule 34.6(e)(3) now provides that the appellate "court *may* submit the dispute to

the trial court for resolution." (Emphasis added.) Since the rule was deliberately changed to eliminate a mandatory remand for a hearing to resolve disputes about the reporter's record after it was filed, the trial court could not presume that this Court would order one. *See generally Marin v. State*, 875 S.W.2d 275, 278 (Tex.Crim.App. 1993) (explaining difference between mandatory and discretionary rules of law).

This Court never issued an order that expressly authorized the trial court to conduct a hearing to settle the factual disputes about the *new* reporter's record. The Court only ordered the trial court to review the *old* record and make it conform to what happened at the trial *before* the new record was filed. It was not even clear that the trial court had the authority to go that far because this Court's orders were issued in response to Appellant's objections to a very small part of the old record.[17] The trial court extended the plain language of this Court's orders to their outer limits by endeavoring, over a two year period, to replace the entire original record with a *new* one instead of correcting the parts of the old one that were specifically disputed. But given the discoveries

17. Appellant initially challenged part of Darin Routier's testimony and the absence of a record of what happened when the trial judge received a note from the jury. This Court's order of October 14, 1998, stated "the dispute is submitted to the trial court for resolution... The trial court must ensure that the reporter's record is made to conform to what happened at trial." 1 SCR-52. The trial court construed the second sentence of that order as a license to review the entire record by severing it from the first one. Appellant asked the Court to abate the appeal for the express purpose of reviewing the entire record, but the Court's order of November 18, 1998, denied this request but did extend the time for the trial court to comply with the October 14, 1998, order.

about the extravagant inaccuracies of the entire Halsey record, this was at least a reasonable goal set by the trial court in order to "ensure that the reporter's record is made to conform to what occurred at trial."

Under the extraordinary circumstances, it arguably was reasonable for the trial court to conclude that it did not have the authority to conduct a full hearing about all of disputes about the completeness and accuracy of the new record unless this Court exercised its discretion to remand the case for a hearing to resolve those disputes.[18]

B. The Findings that the Trial Court Made Before Appellant Objected to the New Record Did Not Resolve the Disputes About It that She Raised.

It is inconceivable that the trial court intended to implicitly resolve all of the factual disputes about the new reporter's record in its order on September 7, 2000, by incorporating its previous findings that the new record conformed to what happened at trial with the exception of the 54 uncertified pages in Volume 10. The trial court did not even know what the factual disputes about the new record

18. A realistic understanding of the circumstances surrounding the trial court's September 7, 2000, order illuminates its intended meaning. It was extremely unusual for an elected district judge to spend two years revising the appellate record in a very high profile, controversial capital case. Although speculative, the appearance of justice may have been damaged if the trial court had conducted a hearing about the new record without an order from this Court because it might have been perceived that the trial court was exceeding its authority and delaying justice to deal with technicalities.

were when it made those earlier findings because Appellant not only could not, but, as directed by the court, did not file her objections to the new record until months later.

The trial court certainly did not resolve the crucial factual dispute about whether the reporter's record of a hearing to determine whether trial counsel had a conflict of interest was lost or destroyed. The new and old records show that trial counsel had a potential conflict of interest because he represented Appellant's husband at a contempt proceeding in this case. The new and old records show that the State asked the trial court to conduct a hearing to decide whether counsel had an actual conflict. CR-55; 22 HR-2671-73; 22 SR-2668-70. Halsey testified that she was present at all of the pretrial hearings, but there is no hearing about that conflict in either version of the record. However, Halsey, the trial judge, and the attorneys agreed in both the old and new records that such a hearing did occur on October 21, 1996. 26 HR-3323-24; 22 SR-3322-23. Simmons testified that Halsey must have made an audiotape of the proceeding that was conducted in the morning on that date. That proceeding was the only part of the trial that was not recorded on the audiotapes that Halsey turned over. The trial court allowed Simmons to include the uncertified stenographic record of the proceeding in her record without deciding whether it conformed to what happened at the trial.

The trial court must have known that the appeal cannot be decided without deciding whether the record of a hearing about the conflict of interest on the morning of October 21, 1996, (or some other date) was lost or destroyed. *See* TEX.R.APP.P. 34.6(f). When the trial judge was aware

that counsel had a potential conflict of interest, as he was in this case, he must conduct a hearing on the record to determine whether it is an actual conflict and, if so, whether the appellant will voluntarily and intelligently waive the right to complain about it. *Wheat v. United States*, 486 U.S. 153, 159 (1988) (prosecutor requested hearing); *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (counsel requested hearing). Harm must be presumed if there was no record of such a hearing. *Calloway v. State*, *supra*, 699 S.W.2d at 829.

Some of the most significant evidence that Appellant offered to introduce at a hearing on her other objections to the new record did not even exist when the trial court found that the new record conformed to what happened at the trial. Halsey admitted that she would not trust her own audiotapes after the trial court allowed Simmons to use those tapes to create a new record without comparing them to Halsey's stenographic notes. Halsey, who was subpoenaed for the September 8, 2000, hearing, could have been compelled to testify about these statements and her conduct involving her record because she waived her right against self-incrimination in this case by answering questions about the subject at her license revocation hearing. *Victoria v. State*, 522 S.W.2d 919 (Tex.Crim.App. 1975) (citing *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969)). The integrity of the new record will remain in doubt until Halsey is asked to explain, among other things, under oath exactly what was wrong with the tapes that Simmons used to create it.

Simmons also gave highly relevant testimony about her new record at the license revocation hearing, a proceeding which also occurred after the trial court found that her record

conformed to what occurred at Appellant's trial. Simmons testified that she included in her record all of Halsey's parenthetical descriptions of hundreds of non-verbal facts about the answers to voir dire questions and Appellant's presence or absence during the trial without trying to determine whether they were accurate. 2 SCR-556; App. 10, p. 67. Appellant objected that all of those parentheticals were inaccurate and had to be deleted from the new record because Simmons could not certify them. 2 SCR-504-8; App. 10, pp. 15-18. The trial court did not resolve that dispute or any of the other questions that Appellant raised about the new record.

C. The Trial Court Must Have Known that the Hearings that It Conducted Before Appellant Reviewed the New Record and Filed Her Objections to It Were Constitutionally Inadequate to Resolve the Disputes About the New Record.

It is inconceivable that the trial court found that the hearings that it conducted before Appellant filed her objections to the new record were constitutionally adequate to resolve the disputes about that record. The trial court presumably knew that the due process clause required notice of the issues to be decided and a reasonable opportunity for Appellant to present her side of the case about the new record with the assistance of counsel. *Chessman v. Teets*, 354 U.S. 156 (1957). Appellant did not receive notice that the hearings were conducted to resolve the disputes about the new record. Appellant did not have an opportunity to read the new record

and object to it before those hearings. Appellant did not have a chance to call any witnesses or exercise her absolute right to make an offer of proof about what their testimony would have been. The trial court also refused to allow her attorney to cross-examine Simmons. This ruling is unprecedented under Texas case law. *Cf. Morrison v. State*, 845 S.W.2d 882 (Tex.Crim.App. 1993) and cases cited therein (trial court's asking of question, *in addition to the lawyers*, strongly cautioned and limited to clarifying questions). Counsel were so concerned about this abrogation of fundamental rights that a written objection was filed. 1 SCR-133; App. 3.[19]

3. THE TIME AND MONEY THAT THE TRIAL COURT EXPENDED TO CREATE A NEW REPORTER'S RECORD THAT CONFORMED TO THE UNAUTHENTICATED AUDIO-TAPES WITHOUT DETERMINING WHETHER HALSEY'S ORIGINAL STENOGRAPHIC NOTES CONFORMED TO WHAT HAPPENED AT THE TRIAL IS NOT AN EXCUSE TO DENY APPELLANT A FAIR OPPORTUNITY TO PROVE THAT THE NEW RECORD IS INACCURATE AND INCOMPLETE BEFORE SHE FILES HER BRIEF.

The only plausible justification for not remanding this case for a hearing on Appellant's objections to the new record that complies with the requirements of due process before

19. This Court should order a hearing complying with due process to correct that manifest injustice before Appellant files her brief even if the trial court intended to implicitly resolve all of the factual disputes about the new record by incorporating its previous orders into its September 7, 2000, order.

she files her brief is the notion that the record is "probably" acceptable because that the trial court invested so much time and money to create it. Of course, time and money prove nothing, as was conclusively shown with the now-stricken Halsey record. To conclude "time and money" are indicia of reliability is misleading, meaningless, and intellectually dishonest under the precedents of this Court and the Supreme Court.

The trial court's investment of its resources to create a new record that conformed to the unauthenticated audiotapes without transcribing Halsey's paper stenographic notes was clearly unwise. Appellant was entitled to verbatim transcription of all the notes taken by the court reporter during the proceedings, *Dunn v. State*, *supra*, 733 S.W.2d at 213-214, because Halsey's original stenographic notes, as noted by Tommy Mullins, are the official record of the trial. *See* TEX.R.APP.P. 34.6(a)(1). Simmons could have produced an accurate official stenographic record by using Halsey's paper stenographic notes to correct the hard copy of the record that Halsey filed.

The record that Simmons created by using the unauthenticated, uncertified audiotapes to change Halsey's inaccurate stenographic record is worthless at the present time. The proper procedure is to (1) transcribe the official stenographic record that Halsey typed; (2) conduct a hearing to settle any disputes about the accuracy of that record; and (3) then make it conform to what happened at the trial if necessary. *See* TEX.R.APP.P. 34.6(a)(1)(e)(2). The uncertified audiotapes might be used as evidence of what happened at the trial if they can be authenticated, but the

reporter cannot use those tapes to create a new record without a hearing and a judicial determination to resolve any disputes about the official stenographic record after it is accurately transcribed. *In re L.B.*, 936 S.W.2d 335, 337 (Tex.App. - El Paso 1996, no writ); *Ex parte Occhipenti*, 796 S.W.2d 805 (Tex. App. - Houston [1st Dist.] 1990, orig. proceeding). In fact, the audiotapes could not have been used as the official record even if they were certified by Halsey to be a true and correct recording of what happened at the trial. *Soto v. State*, 671 S.W.2d 43 (Tex.Crim.App. 1984).

In *Williams v. State*, 427 S.W.2d 868 (Tex.Crim.App. 1967), the court reporter who attended the trial died before he transcribed some of his stenographic notes and certified the record. The deceased reporter's uncertified partial transcript of the trial, his stenographic notes, and his uncertified backup audiotapes were given to a new reporter who produced and certified a new record. A hearing was conducted to resolve disputes about the new record. At the hearing, the new court reporter acknowledged that he did not compare the audiotapes to the stenographic notes. The new reporter was ordered to make that comparison before the hearing was completed and the record was settled, just as one of the court's experts, Tommy Mullins, recommended in this case. This Court held that the new record was acceptable because the Appellant certainly had his day in court on settlement of the record. *Williams v. State*, *supra*, 427 S.W.2d at 872.

Appellant is still waiting for her day in court. The need for a careful comparison of the audiotapes and stenographic notes and a fair hearing to resolve any discrepancies between

them is greater here than it was in *Williams* because there are serious questions about the impartiality of the original court reporter and the integrity of her audiotapes.

Appellant should not be required to file her brief before the trial court conducts a hearing on her objections to the new record just because it will delay her appeal and increase its cost. In *Davis v. State*, 932 S.W.2d 127 (Tex.App. - Houston [1st Dist.] 1996, no pet), the Court of Appeals remanded the case to the trial court for a third hearing about the accuracy and completeness of the reporter's record with considerable reluctance and sympathy for the trial court because the appellant proffered uncontroverted evidence that the defects in the record were not cured at the previous hearings. Appellant made such a proffer and she is entitled to the same relief.

In *Dunn v. State*, *supra*, the trial court engaged in the mammoth task of reconstructing portions of a record of a capital trial that was lost. 733 S.W.2d at 216. It took more than two years to complete the reconstruction with the cooperation of all parties, but it was not legally acceptable. 733 S.W.2d at 216-17. This Court held that it could not be used in spite of all of the resources that were wasted to create it because it is a fundamental and axiomatic rule of law that "no man shall suffer the penalty of death at the hands of the law until he has been accorded his legal rights." *Dunn v. State*, *supra*, 733 S.W.2d at 217 (citation omitted). The creation of the Simmons record was also a mammoth task, but that is not an excuse to disregard the laws for settling disputes about the record in a capital case. And as already discussed, the record dispute in *County v. State*, *supra*, was not even raised until appellant's motion for rehearing.

Appendix I

In *Chessman v. Teets*, 354 U.S. 156, 165 (1957), the Supreme Court stayed an execution at the last possible moment and ordered a second hearing on a condemned person's complaints about the appellate record because he was denied due process at the first hearing. The Supreme Court explained,

> Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands.

Chessman v. Teets, 354 U.S. at 165.

Appellant does not want to save her objections to the record as an insurance policy against her execution. Her goal is to obtain a fair appeal and a new trial as quickly as she can reasonably can from the first court that is able and willing to enforce what the constitution demands in this case.

WHEREFORE, for the reasons stated above, the Court should remand the case for the trial court to conduct an evidentiary hearing on all of Appellant's objections to the new reporter's record, resolve all of the factual disputes, make

the new record conform to what occurred at the trial if it is possible to do so and grant any other relief that is required by law and justice.

Respectfully submitted,

J. STEPHEN COOPER

3524 Fairmount Street
Dallas, Texas 75219
214-522-0670
FAX 214-522-0670
SBN 04780100

Counsel for Appellant

APPENDIX J — FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF THE UNTIED STATES AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *